The Dissertation Committee for William Erickson Carter

Certifies that this is the approved version of the following dissertation:

ACADEMIC FREEDOM

THE SILENCING OF THE FACULTY

Committee:

Patricia Somers, Supervisor

Norma V. Cantu

Mark A. Gooden

Susan S. Heinzelman

Arthur Tyler

ACADEMIC FREEDOM

THE SILENCING OF THE FACULTY

by

William Erickson Carter, B.B.A.; M.B.A.

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

May, 2013

Dedication

To my wife Sabrina Hassumani, and our best part, Nicole Hassumani-Carter: your love and passion for education allowed me the freedom to explore the infinite abyss.

Acknowledgements

The importance of education was instilled in me first by my parents and later by my in-laws. I was raised in an environment where every day was a learning experience and I married into a family where open debate was an integral part of life.

To my wife and best friend Sabrina: you lifted me up when I was down, sacrificed countless weekends and movies to let me write, gave me the will to see this through, and loved me unconditionally. I could not have completed this without you. Thank you for building a very big fire so that we could always find each other.

To my parents Douglas and Erma Carter: thank you for giving me the confidence to never fear failure and for loving me for who I am. You are with me always.

To my mother and father-in-law Aqila and Anver Hassumani: thank you for expecting me to begin this journey and for expanding my knowledge of the world.

To my dissertation chair Dr. Pat Somers: thank you for agreeing to chair my dissertation and being available whenever I needed you. Your guidance and dedication to my success enabled me to complete my program and dissertation. I am indebted to you for life.

ACADEMIC FREEDOM

THE SILENCING OF THE FACULTY

William Erickson Carter, Ph.D.

The University of Texas at Austin, 2013

Supervisor: Patricia Somers

The purpose of this study is to examine the status of academic freedom and, more specifically, intramural and extramural speech at universities in the U.S. since 2000. Court opinions and briefs from benchmark court cases and the faculty's perspective of current academic freedom issues are analyzed to determine dominant trends and themes that have evolved since 2000. While others have studied the relationship between the First Amendment and academic freedom, this analysis brings current the discourse concerning the effect First Amendment court decisions have on the faculty speech. The central research question is to determine the effect court decisions have on the intramural and extramural speech of faculty and specifically to study how federal, state, and local events since 2000 have affected (a) the academic freedom of faculty in general, (b) the way universities handle faculty intramural speech, (c) the way universities handle faculty extramural speech when they speak both as a citizen and a public university employee, and (d) the ability of faculty to defend their academic freedom. Using post-modern theory, the two-phased mixed methods study deconstructs

and analyzes (a) the six First Amendment court opinions and briefs and (b) the 19 interviews of public university faculty members. The first phase identified 11 dominant themes, which were used as the basis for the coding and the 19 interviews of public university faculty members. The interview coding and analysis identified 15 themes. Based on the Pearson Correlation Coefficient, four themes were identified in the court opinions and six in the interviews are discussed. The second phase also included surveys of the faculty interviewed and a quantitative analysis of the responses in order to classify the sample. The study found that public universities have complete control over academic freedom, and that it is a privilege granted to faculty based on their scholarly association with the university, not a right. Public university administrators, general counsels, deans, department chairs, and faculty will benefit from the study as it provides an intensive analysis of post-2000 court case logic and the current perceptions and apprehensions that faculty have concerning their intramural and extramural speech rights.

Table of Contents

List of Figures

List of Tables

Chapter One: Introduction

Everyone will remember where they were on September 11, 2001 when the first plane hit the north tower of the World Trade Center at 8:46 a.m. (Smith, 2003), but few will evaluate the impact that the event has had on Constitutional rights and the academic freedom rights of faculty for the decade to come. The 9/11 attacks and "[t]he war [on terrorism have] unquestionably brought a new level of scrutiny to our politically correct campuses" (Denvir, 2003, para. 1) and caused "free and frank intellectual inquiry [to be] under assault by overt legislative acts and by a chilling effect of secrecy and intimidation in the government, media, and on college campuses" (O'Neil, 2003, para. 2). Universities and faculty have endured these assaults in the past but 9/11 has forced them to compromise their values and beliefs to evade the risk of persecution for classroom discussions and external speeches considered un-American. As O'Neil warns, "prominent among the risks of this anxious period is the one of which the cartoon character Pogo wisely warned, during the darkest days of the McCarthy era, that 'we have met the enemy and it is us'" (O'Neil, 2003, para. 22).

In fact, 9/11 is the most recent example of a series of historical events that have impacted academic freedom in America. Since 1900, four distinct periods have occurred in which ideological fears triggered public scrutiny and political pressure to impose restrictions on citizen's rights in the name of national security. The four periods are designated as the pre-McCarthy (1890 to 1939), McCarthy (1940 to 1959), post-McCarthy (1960 to 1999) and neo-McCarthy (2000 to present) eras. Each resulted in well-organized legislative efforts to control free speech and freedom of association

rights as well as corresponding defensive efforts by the American Civil Liberties Union (ACLU) and American Association of University Professors (AAUP) to protect them.

The pre-McCarthy era (1890 to 1939) coincided with Americans' fear in the late 1800s that communism was infiltrating the U.S. and ended in 1939 with the start of World War II (WWII). During this era, the public's fear of communism bolstered patriotic behaviors, which resulted in citizens with communist beliefs or affiliations being persecuted as subversive and un-American. Academics teaching in the areas of the social sciences and humanities were especially vulnerable as their subjects included discussions, research, and publications on communism, economics, politics, and psychology. Legislators and university benefactors who disagreed with the topics of these discussions used their influence to pressure boards to silence or terminate faculty. These injustices resulted in organized movements by professional associations to establish the faculty's right to teach, to speak as citizens, and to conduct research. The formation of the American Association of University Professors (AAUP) in 1915 gave faculty an organization dedicated to defending faculty rights and monitoring due process when academic disputes occurred. The AAUP's *1915 Declaration of Principles on Academic Freedom and Academic Tenure* (American Association of University Professors [AAUP], 2006) became the quintessential document for academic freedom and is endorsed by most universities and many higher education groups.

The McCarthy era (1940 to 1959) coincided with the AAUP's *1940 Statement of Principles of Academic Freedom and Tenure* (AAUP, 2006) and the second Red Scare (Bigsby, 2006). The era was remembered for WWII, the Korean conflict, the Cold War, and Senator Joseph McCarthy's investigations and prosecutions of people suspected of communist activities and disloyalty to America (O'Neil, 2008). These events epitomize the ideological battles fought not only in foreign countries but also in the House Un-American Activities Committee (HUAC), formed in 1938, and the Permanent Subcommittee on Investigations (PSI), formed in 1952 and chaired by McCarthy. These committees acted as the federal government's arm for investigating communist activities. Even though most universities endorsed the AAUP's *1940 Statement*, the 1950s were a time of AAUP inaction with no investigations into academic freedom violations being conducted until 1956, due to lack of leadership (O'Neil, 2008). Unchecked, McCarthy's efforts resulted in at least 100 tenured university professors being put on trial by the courts, dismissed, or denied tenure for suspicion of being communist sympathizers, or for refusing to expose accused colleagues to legislative committees (O'Neil, 2008). Hundreds, if not thousands, of lives were ruined in the process. The era ended with the demise of McCarthy's unrelenting pursuit of communist organizations and sympathizers in 1957 and the AAUP regaining its leadership and reestablishing its position as the guardian of academic freedom (AAUP, 1989).

The post-McCarthy era (1960 to 1999) coincided with the start of the Vietnam War, the civil rights movement, the rapid expansion of higher education, and the Persian Gulf War. As had occurred in the previous periods, conflicts between two ideologies,

communism and democracy, occurred as the Vietnam War intensified and U.S. citizens considered the moral justification of and purpose of war (Bigsby, 2006). These events brought universities and academics into the fray as faculty and students openly discussed political and social issues in classrooms and demonstrated on campuses. With the constraints of the McCarthy era lifted, faculty and students united in their demands for due process and freedom of expression (Brunner & Haney, n.d.). A number of legislative Acts provided support for their demands. These Acts included the Civil Rights Act (1964), Equal Pay Act (1963), Age Discrimination Act (1967), Rehabilitation Act (1968), and the Individuals with Disabilities Act (1973). Each recognized and supported the notion that all Americans are equal regardless of race, ethnicity, age, or gender.

In the 1960s, the Supreme Court also recognized individual rights as Constitutionally protected under the First, Fifth, and Fourteenth Amendments and academic freedom as a special concern of the First Amendment (Kaplan & Lee, 1995). In *Shelton* (1960), the courts ruled that refusing to divulge an individual's involvement with an organization could not be a condition of employment (Kaplan & Lee, 1995). In *Keyishian* (1967), the courts declared that "our nation is deeply committed to safeguarding academic freedom [and] is therefore a special concern of the First Amendment" (pp. 301-302). These decisions provided faculty with protection of their intramural and extramural speech. The AAUP provided further support as the new leadership investigated 191 (AAUP, January 2009) violations of academic freedom with 143 universities resulting in censor (see Appendix A).

The technology revolution of the 1990s changed the methods faculty used to instruct, conduct research, and publish but also made the information readily accessible to the public for review. The speed and openness of the Internet allowed written, filmed, or recorded opinions to be published and shared with millions within seconds. The advancements gave faculty unfettered speech but also provided well-funded advocacy groups, alumni, and legislators with a medium for collecting information and countering faculty speech. As the 1990 Persian Gulf War began, these issues again led to conflicts between faculty rights to unfettered classroom discussion and extramural speech and the right of the university as the employer to control them. As a result, the faculty confronted the same academic freedom issues entering the 21st century as it did at the start of the 20th century.

The post-9/11 period is the focus of this study and designated as the Neo-McCarthy era (2000 to present). The September 11th attacks on the World Trade Center and the Pentagon, symbols of U.S. financial and military supremacy, launched the "war on terrorism." The government responded with efforts aimed at reassuring a nation uncertain of the future by quickly passing the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001) otherwise known as the USA Patriot Act (Dudziak, 2003). The Act provided for "an unprecedented peacetime abrogation of civil liberties in a single legislation whose name [alone] discouraged dissent" (p. 12). The Act increased the government's rights to secrecy, surveillance, and suppression of information. It restricted faculty from publishing or presenting on topics and research designated as sensitive, allowed for the

unwarranted gathering of private conversations and electronic information for intelligence purposes, and permitted the suspension of U.S. citizens' Constitutional rights to free speech, association, and due process (AAUP, November 2003). Conservative advocacy groups such as Students for Academic Freedom and Campus Watch supported these efforts and called for McCarthy-style investigations into hiring and tenure practices of universities and for increased oversight of curriculum taught by faculty that they deemed radical (O'Neil, 2003). These activities revived memories within the Academy from a half-century earlier when, during the McCarthy era, the AAUP (along with many other civil liberties groups) failed to exert the level of leadership that the academic community expected of such a consistently protective organization. To address these doubts, the AAUP formed the Special Committee on Academic Freedom and National Security in Times of Crisis to maintain a close eye on the situation (O'Neil, 2003).

Problem Statement

Currently, academic freedom faces the most serious challenges and setbacks since the McCarthy era (Doumani, 2006). The hasty passage of the USA Patriot Act in 2001 and the subsequent efforts of well-funded and politically-connected advocacy groups have threatened the faculty's academic right to free and open inquiry and research; to design curriculum and teach freely within their university or college disciplines; and to unfettered extramural utterance and action as citizens (AAUP, 2006). As the *1915 Declaration* infers, faculty in the social, political, and economic disciplines are the ones most likely to speak and express diverse opinions that have resulted in

punitive actions by individuals and organizations internal and external to the university (AAUP, 2006). These actions have resulted in faculty in these disciplines being labeled as radical, unpatriotic, or subversive and their actions have been countered by legislators, courts, governing boards, alumni, students, and the media, who all impelled faculty to censor their behaviors or face the possibility of legal prosecution and dismissal. The question of whether these actions, a decade after September 11, 2001, continue to dominate the discourse and chill intramural and extramural speech in the social sciences, humanities, and communications fields requires further study.

Significance

As in previous eras, academic freedom in the post-9/11 moment faces an uncertain future as pressures attempt to curtail free speech and silence faculty. Giroux (2006) attributes these activities to rightwing forces that have hijacked political power and are undermining the principles of academic freedom in the name of patriotic correctness. Cole adds in stating that increased "attacks on professors…in the name of national security suggest that [academia] is headed toward another era of intolerance and repression" (2005, p. 5). Affirming these comments, Somers states that, "academic freedom of expression for faculty, staff, and students has become a casualty in the post-9/11 world" (n.d., p. 1) and concludes that "the mass psychology of wartime capitalizes upon citizens' fear to allow for restricted freedoms" (p. 7). Together, these comments suggest the need for continued research to understand the influences effecting academic freedom. As Nelson (December 2009) states,

> Academic freedom must be regularly redefined in the context of the cultural and political debates currently shaping higher education's public identity. Like it or not, academic freedom is not simply an unchanging platonic ideal. It is reshaped in response to contemporary political struggles and changing legal, economic, and technological realties. (pp. 1-2)

Public university administrators, general counsels, deans, department chairs, and faculty benefit from the study as it provides an intensive analysis of post-9/11 court case logic and faculty perceptions of their intramural and extramural speech rights and adds to existing research concerning faculty speech rights.

Method

The mixed methods study focuses on the changing academic landscape since 2000. The sources of data include both qualitative (pre-selected free speech court cases and interviews of selected public university faculty) and quantitative (surveys of faculty at public U.S. universities) data. The first part of the qualitative research is the review of six Supreme, appellate, and district court cases pertinent to intramural and extramural faculty speech. The analysis utilizes court briefs by various scholars and civil liberties organizations. Analysis of the logic in these cases and related documents provides the judicial reasoning for the courts' actions and the courts' changing attitude toward academic free speech rights at the national and state levels.

The second part of the qualitative analysis includes 19 interviews of faculty members from U.S. public universities. The interviews were conducted in person or by phone. The interviewer asked five open-ended questions that were recorded, transcribed, coded, and deconstructed to determine dominant patterns and themes. The interviews

provide the broad academic perspective of what is happening to faculty intramural and extramural speech a decade after the attacks.

The quantitative analysis includes surveys of the faculty interviewed. The survey consists of seven multiple choice questions that collect demographic information such as region of country, age group, ethnicity, gender, assignment type, whether the participant has participated in shared governance at their institution, and whether the faculty member has published on the topic of academic freedom. The survey assists in defining the characteristics of sample to make it replicable at other universities if further research is needed.

Delimitations

1. The study is restricted to the U.S. Supreme, appellate, and district court cases specific to free speech and faculty intramural and extramural free speech rights at public universities in the U.S.
2. The AAUP provides many academic freedom policies and statements that are outside the scope of this study. This study focuses on AAUP policies and statements concerning faculty intramural and extramural speech at U.S. universities.
3. The cases used in the study are retrieved from the Lexus-Nexus database and law libraries.
4. Definitions, policies, and legal briefs published by American Association of University Professors are used extensively in the discussions concerning academic freedom.

5. The primary focus of the study is First Amendment cases adjudicated from 2000 to present in the U.S. Supreme, appellate, and district courts.
6. Primary focus is on the tenured and tenure-track faculty teaching at U.S. universities and, therefore, part-time, temporary, and visiting scholars are excluded.

Definitions

The study uses terms, acronyms, and abbreviations that refer to various government agencies, academic associations and legislation. To avoid confusion, a list of the key terms used in the research is presented below.

Academic freedom. The right (especially of a university teacher) to speak freely about political or ideological issues without fear of loss of position or other reprisal (Garner, 1999). In the context of this study, academic freedom refers to intramural speech (classroom discussion) and extramural speech (faculty speech outside the classroom).

Chilling effect. The result of a law or practice that seriously discourages the exercise of a Constitutional right, such as the right to appeal or the right of free speech (Garner, 1999).

Constitutional freedom. A basic liberty guaranteed by the Bill of Rights of the U.S. Constitution, such as the freedom of speech (Garner, 1999).

Constitutional law. The body of law deriving from the U. S. Constitution and dealing primarily with governmental powers, civil rights, and civil liberties (Garner, 1999).

Culture wars. A metaphor used to define the political conflict, based upon the set of conflicting cultural values, between those considered traditional or conservative and those considered liberal.

Extramural speech. The AAUP defined faculty right to be free from institutional censorship or discipline when they speak or write as citizens (AAUP, 2007a).

Intramural speech. The AAUP defined faculty right to full freedom in the classroom in discussing their subject (AAUP, 2007a).

McCarthyism. The ideology defined by the time period between 1950 and 1954 in which Senator Joseph McCarthy of Wisconsin chaired the Permanent Subcommittee on Investigations (PSI) and instigated widespread investigations into alleged Communist infiltration in U.S. public life (Bigsby, 2006). The study uses the term thematically to identify periods during which the U.S. government, university authorities, or external organizations acted to restrict free speech and behaviors deemed anti-American.

September 11th or 9/11. The terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001.

Terrorism. Activities that "(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State within… (B) appear to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping, [and] (C) occur [both inside and outside of] the territorial jurisdiction of the

United States, or transcend the national boundaries in terms of the means by which they are accomplished, the persons they appear to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum" (United States Criminal Code 18, 2002).

United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act or Patriot Act). Legislation signed by President George W. Bush on October 26, 2001 that "consists of ten titles, revises fifteen existing federal statutes, and deals with numerous activities related to terrorism, ranging from laundering money to providing support to the victims of terrorism" (AAUP, November 2003, p. 38). The Act was amended and reauthorized in 2006. Provisions of the Act expired in February 2011 (American Civil Liberties Union, February 2011).

Organization of the Study

Chapter one provides an introduction to the study and includes a problem statement and the significance of the problem with salient information discovered in the literature review. Also included is the summary of the research method discussed in chapter three with the central research question, the assumptions and limitations of the research study, and the definitions of key terms used in the study. Chapter two contains a review of the relevant literature. The purpose of the literature review is to present an epistemological basis for the research surrounding the faculty academic intramural and extramural speech rights on public college and university campuses. To accomplish this task, research has been culled from a variety of topics and is presented in four distinct

periods, pre-McCarthyism, McCarthyism, post-McCarthyism, and neo-McCarthyism. Each period is presented with a discussion of the contemporary period's position on academic freedom, an historical perspective of the major events and legislation passed, and the court cases relevant to speech rights in general and academic freedom, in particular. The chapter concludes with a summary of the literature and its relevance to the research study.

Chapter three discusses the research methodology of the study. The chapter defines the problem, emphasizes the rationale for the study, and presents the research questions addressed. The analytic paradigm section discusses the postmodern approach used to guide the research and interpret and extrapolate the data from the court cases, faculty interviews, and surveys. The relationship of these data sources is discussed to provide an understanding of how the study proceeded. The discussion includes diagrams illustrating the flow of research, participants in the study, and methods used for validation testing. It also provides the list of questions for the interviews and surveys and the characteristics of the data collected by the online survey. This methodology allows the research to follow a structured path to determine the effect major events since 2000, such as 9/11, have had on the intramural and extramural speech rights of faculty when speaking as public university employees and U.S. citizens.

Chapters four through ten discuss the research and findings of the first phase of the study. Chapters four though nine provide an analysis of the court opinions and briefs of the six cases selected as they progressed through the courts. The cases include *Grutter v. Bollinger* (2003), *Garcetti v. Ceballos* (2006), *Schrier v. University of Colorado*

(2005), *Hong v. Grant* (2010), *Churchill v. University of Colorado* (2011), and *Adams v. University of North Carolina – Wilmington* (2011). The chapters provide a detailed analysis of the major themes found in the court opinions and briefs of each case using tables and figures to illustrate them. Chapter ten concludes with a discussion of the combined case themes and the findings of the first phase of the research.

Chapter eleven discusses the research and findings of the second phase of the research. The chapter provides a detailed analysis of the themes found in the 19 faculty interviews conducted as part of the research. The analysis discusses the findings and concludes the research of the study.

Chapter twelve concludes the research with a discussion of the major findings and the researcher's observations. This chapter presents a summary of the study and important conclusions drawn from the data and findings presented in chapters four through eleven. Included is a discussion of the implications of the study and the recommendation for further research on academic freedom.

Summary

Almost immediately after 9/11, conservative advocacy groups accused professors of indoctrinating and intimidating students and pointed to U.S. foreign policy and academic freedom as the reason (Gerstman & Streb, 2006). To illustrate this belief, the AAUP reported handling "1,121 complaints and cases regarding academic freedom…from May 2002 to May 2004" (p. 18). As occurred in each of the four periods discussed, national events and ideological conflicts have driven America's discourse over academic freedom. Understanding the issues of how a citizen's free speech has

been compromised and why faculty need protection of their academic freedom, requires a review of historical events and landmark court decisions. These and other controversies are discussed in the literature review.

The literature review discusses the pre- and post-9/11 battles fought to defend faculty's freedom of inquiry, research, teaching, and extramural utterance. The chapter is divided into the four distinct periods (pre-McCarthyism, McCarthyism, post-McCarthyism, neo-McCarthyism). Each section includes historical perspectives of the major events and academic free speech court decisions that faculty have confronted since 1890. The impact of these cases on faculty intramural and extramural speech rights in the neo-McCarty era is the focus of the study.

Chapter Two: Literature Review

Chapter two provides an historical background of four distinct periods from the 19th century to 2010 that delineate American academic freedom as it pertains to faculty intramural and extramural speech. The time periods are centered on the McCarthy era as it signifies a moment when citizen's ideological beliefs were used against them to curtail their Constitutional rights and, therefore, faculty academic speech. Veysey commented that, "the history of academic freedom has become a rather accurate reflection of social alarm felt at any given moment by the more substantial elements in the American population" (1965, p. 410). Understanding these moments and the background of academic freedom in America provides a basis for examining whether faculty in the social sciences and humanities are being silenced in the new McCarthyism of the 21st Century.

The time periods in this chapter are designated as pre-McCarthyism (through 1939), McCarthyism (1940 to 1959), post-McCarthyism (1960 to 1999), and neo-McCarthyism (2000 to present) eras. The discussion of each includes an historical perspective to ground the time period and to understand the external forces affecting academic free speech in America. Policies and procedures from the American Association of University Professors are presented to explain the evolution of academic freedom and to present the national issues surrounding intramural and extramural free speech. Included in the discussion are major external influences, legislation, and court cases that have obstructed free and unfettered instruction and speech at public

institutions. The chapter concludes with a synopsis of the current status of academic freedom and introduces the research that is conducted in the study.

Pre-McCarthyism–Academic Freedom to 1939

Historical perspective. Crabtree noted, "the first noteworthy incident of academic freedom occurred in classical Greek times" (2002, para. 5). Socrates' efforts to awaken "the people of Athens from their intellectual and moral complacency [resulted in his trial] for not worshiping the gods of Athens and corrupting [Greek] youth" (para 5). Socrates believed that his pursuit of "Truth" was a divine calling and that "he could not allow any person or human institution to deter him from carrying [it] out (para. 5). During the Medieval Period, the Christian universities in Europe adopted these tenets as these academics believed that they were "charged with the God-given task of searching out and teaching truth [and] that academics were carrying out a mission that transcended the authority of any man or human institution to countermand" (para. 7). "Between 1820 and 1890, almost nine thousand Americans studied at German universities [and] returned as fully trained professionals in their disciplines" (Goodschild & Wechsler, 1989, p. 184). The concept of academic freedom was imported to the U.S. by these scholars (Veysey, 1965). It originated from the German ideas of "*Lernfreihiet*, the freedom of the student to select their own studies in an elective system, and of *Lehrfreiheit*, the freedom of the professor to investigate and teach the results of their research without government interference" (p. 384). These callings and searches for truth formed the basis for American colonial academic freedom as universities were

established in the colonies by Europeans and faculty educated in England, France, and Germany arrived to live and teach in the new world.

President Charles Eliot addressed *Lernfreihiet*, the student's right to choose with the implementation of the "elective system" at Harvard in the mid-1800s. The elective system represented America's attempt to recognize college students as adults and provide them with the academic freedom to investigate and choose their career paths from a variety of disciplines. The system allowed students to select courses outside of a structured core curriculum in an effort to promote individual decision-making and diversity in education (Goodschild & Wechsler, 1989). Elliot asserted that the system gave "the great majority of the students…liberty to pursue some subject or subjects with a reasonable degree of thoroughness [and to] choose subjects which are related to, or underlie, their future professional studies" (p. 377). Elliot believed that this liberty resulted in concentrated studies and developed into single lines of advanced teaching that raised the level of instruction (Goodschild & Wechsler, 1989). These beliefs kindled the need for faculty to teach freely and conduct more research in their areas of specialty.

The American concept of *Lehrfreiheit,* faculty academic freedom, focused on the definitions and protections of faculty intramural and extramural speech (Goodschild & Wechsler, 1989). Doumani echoed, "America's scholars produced their own *Lehrfreiheit* that reflected a strong social, cultural and Constitutional commitment to freedom of speech and a more pragmatic commitment to the social utility of professional scholarship" (2006, p. 63). This version restricted classroom discussion to materials pertinent to the subject and required subjects to be presented in a neutral manner

(Goodschild & Wechsler, 1989). It also extended the definition of academic freedom to include speech outside of the university and insisted "that a professor should no more be penalized for exercising [their] Constitutional rights of free speech than any other citizen," (p. 186) thus associating academic freedom with civil liberties. These definitions and protections allowed faculty to be independent from outside interference and more responsive to the social and economic needs created by the accelerated urbanization, industrialization, and settlement of post-Civil War America (Goodschild & Wechsler, 1989).

In the late 19th century, these concepts of academic freedom reshaped higher education. Demands by businesses and the government for students with scientific and technical knowledge, resulted in new university models (Goodschild & Wechsler, 1989). Small, tightly regulated, rural colleges were supplanted by university centers dedicated to free inquiry, "the education of mass society, the expansion rather than perpetuation and transmission of knowledge, and the teaching of vocational and technical skills" (p. 182). Serving these centers were professional schools specializing in law, medicine, and the sciences that assumed equal ranking with subjects in the humanities and provided diversified and specialized curricula (Goodschild & Wechsler, 1989).

Supported by the Morrill Land Grant Act of 1862, universities expanded to handle new curricula in agricultural and mechanical arts training for the "common man" (Goodschild & Wechsler, 1989). The Act provided 17.5 million acres of federal land nationwide, or 30,000 acres per state, as grants to expand existing universities and establish new ones (Goodschild & Wechsler, 1989). Branded as "land-grant colleges,"

they stood “for the all-purpose curriculum and for service to the community” (p. 189) and to “promote the liberal and practical education of the industrial classes” (p. 262). After the Civil War, the Hatch Act of 1887 and Morrill Land Grant Act of 1890 developed agricultural research centers as part of the land-grant universities and established Black land-grant universities through cash to the Confederate states respectively (Goodchild & Wechsler, 1989). These Acts, along with funds from wealthy benefactors, reshaped public higher education and resulted in pressures being exerted on faculty to refrain from criticizing socio-economic and immigration policies that the government and business supported.

The start of the twentieth century represented one of the “most repressive periods in American history” (Blanchard, 2002, p. 360). As World War I (WWI) began, “the three branches of the federal government acted to ensure that executive policy, legislation and judicial decisions combined to silence disagreement with the wartime policies of Woodrow Wilson” (p. 360). WWI ended in 1918 with a barrage of legislation being passed that reduced freedoms in the name of national security and restricted immigrations to the U.S.

Two pieces of legislation passed in 1917, the Immigration Act and Espionage/Sedition Act, provided the government with the legal authority to deny Asians access to the U.S. and to silence and jail citizens who did not believe in organized government. The Immigration Act, also known as the Asiatic Barred Zone Act, was passed on February of 1917, overriding President Woodrow Wilson’s

December 1916 veto (Tucker & Creller, 2007). The Act banned the immigration of citizens of eastern Asia and Pacific Islands and excluded admission into the U.S. of all

> anarchists or persons who advocate the overthrow of the government of the United States, or who disbelieve in or are opposed to organized government [or are] members of or affiliated with any organization entertaining or teaching disbelief in or opposed to organized government. (Immigration Act, 1910-1917)

These provisions were amended in 1924 to include any alien who by virtue of race or nationality or lineage was ineligible for U.S. citizenship. As Chinese were already banned from entering the U.S., the 1924 provision was directed at Asians not previously banned from immigrating such as the Japanese (U.S. Department of State, 2010).

The Espionage Act of 1917 as amended by the Sedition Act of 1918 provided the second major action by the federal government to control expression and activities. The Act stated that the:

> uttering, printing, writing or publishing any disloyal, profane, scurrilous or abusive language, or language intended to cause contempt, scorn, contumely or disrepute as regards the form of government of the United States, or (3) the Constitution, or (4) the flag, or (5) the military or naval forces, or (6) the uniform of the army or navy; (7) any language intended to incite resistance to the United States or promote the cause of its enemies. (Virginia Law Review Association, 1920, p. 54)

The Sedition Act provided the U.S. government with the right to suppress academic freedom and free speech rights. Combined with the Immigration Act, the U.S. now could control access to the U.S. and regulate controversial speech.

With this legislation enacted, the federal government entered a second phase of repression from 1919 to 1920 called the first Red Scare. Blanchard (2002) asserts that this phase "stemmed from the nation's first encounter with the Communist Party and its territorial and political designs [and] a disabled president in the White House" (p. 362).

Spurred by propagandist George Creel, chairman of the United States Committee on Public Information, the Red Scare resulted in thousands of suspected unpatriotic dissenters and draft resisters being jailed as communists, socialists, anarchists, or dissidents and hundreds being deported with little regard for due process (Bigsby, 2006). The repeal of the Espionage and Sedition Acts in 1920 and end of the first Red Scare in the same year did not end the tension between government and academia as the country entered the Great Depression of 1920-1921.

Under this autocratic governance through the end of the 19th century, a distinguished roster of academicians exercised their academic freedom and, as a result, clashed with legislators and wealthy benefactors (Rudolph, 1990). From 1890 to 1910, a number of prominent faculty were criticized or terminated for their intramural and extramural speech. The faculty members included

- economist Richard Ely in 1894 at the University of Wisconsin for speaking in favor of strikes and boycotts,
- economist Edward Bemis in 1897 at the University of Chicago for criticizing the public railroads during the Pullman strike,
- political scientist James Allen Smith in 1897 at Marietta College (Ohio) for opposing monopolies,
- economist, E. Benjamin Andrews, President at Brown University, in 1897 for his preference for free silver and free trade,
- economist John R. Commons in 1894 at the University of Syracuse for his controversial economic views,

- historian John Spenser Bassett in 1900 at Trinity University in North Carolina for supporting Black civil rights, and
- numerous economics faculty in the 1890s at Kansas State University (Rudolph, 1990).

The trend of these dismissals changed with the termination of sociologist Edward Ross at Stanford University (Veysey, 1965).

In 1900, Stanford University Professor Edward A. Ross was dismissed for "advocating free silver and against the importation of cheap Asian labor" (Doumani, 2006, p. 65) which, at the time, was used extensively for the westward development of the railroads. Leland Stanford, a politician, railroad builder, and the university founder, and his wife became distressed by Ross' activities and demanded his dismissal (Doumani, 2006). The demand came from the co-founder and proprietor of the university, Mrs. Leland Stanford. In a letter, she ordered President David Starr Jordan to notify Ross "before the close of the semester" that he would "not to be reengaged for the new year" (Doumani, 2006, p. 65). The president obeyed Mrs. Stanford's orders and dismissed Ross who resigned in protest. In response to Stanford's actions, seven other faculty members resigned and a group of members of the American Economic Association, the most powerful of the academic disciplinary groups of the time, opened an investigation (Scott, 2009).

Economist Edwin R.A. Seligman and philosophy professor Author Lovejoy, outraged by Starr's decision, were two of the seven faculty members who resigned their positions at Stanford. Together, they spearheaded the American Economic Association's

investigation into the dismissal of Ross with the formation of a joint committee of their peers from members of the American Economic Association, the American Political Science Association, and the American Sociological Society. Their goal was to change the professoriate's doctrine of employment-at-will and the trustee's ability to terminate faculty without cause (Doumani, 2006). The joint committee was to report on academic freedom and tenure as it related to their fields (AAUP, 2006) and present their preliminary report at the combined meeting of the three associations in December 1914. After review, the associations recommended that the report be presented at a meeting of the newly formed American Association of University Professors (AAUP) as the mission of this new group was to protect academic freedom, develop a code of ethics, and create agreed upon standards for promotion and tenure of faculty (Rudolph, 1990). The report was presented at the January 1915 meeting. AAUP President John Dewey authorized the formation of a 15-member committee with Seligman as the chairperson to investigate the problem of academic freedom. The committee was charged with reviewing the issues and presenting their findings and recommendations to the AAUP (AAUP, 2006).

Just as the committee was starting their investigative work, 14 cases documenting violations of academic freedom were referred for review and consideration (Kaplan & Lee, 1995). The cases were diverse in nature and included "dismissals of individual professors, dismissals or resignations of groups of professors including the dismissal of a university president, and complaints from a university president against his board of trustees" (AAUP, 2006, p. 291). The cases highlighted the abuses and

demonstrated the importance of the committee's charge and the need for such assistance for academics of all ranks. To address the complaints and continue the committee's work on the larger issue of academic freedom, sub-committees were formed to consider the details and make recommendations (AAUP, 2006).

AAUP 1915 *Declaration of Principles on Academic Freedom and Academic Tenure.* The report and recommendations of the committee were presented to the AAUP as the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*. The report provided

> a clear understanding of the principles which bear upon the matter, and the adoption by the universities of such arrangements and regulations as may effectually prevent any infringement of that freedom and deprive of plausibility all charges of such infringement. (AAUP, 2006, p. 292)

The report was divided into two sections: the General Declaration of Principles relating to academic freedom and Practical Proposals which outlined rules and procedures for universities to follow concerning academic freedom (AAUP, 2006).

General Declaration of Principles. The first section, the General Declaration, identified the origins of academic freedom, provided an overview of academic freedom of the American university faculty and addressed the purposes for the existence of public universities. The German origins of academic freedom, *lernfreihiet* and *lehrfreiheit*, as discussed above, provided the basis for the three discernible pillars of American academic freedom: freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action without interference from government (AAUP, 2006). The *Declaration* stated that the first, freedom of inquiry, seemed to be safeguarded with only slight infringements but that the

second and third, freedom of teaching and extramural utterance, were more often the ones that resulted in complaints. With the third element, extramural speech without interference by government, protected by each citizen's freedom of expression and speech rights, the faculty's right to teach became the focus of the report with clarifications on related issues provided as necessary (AAUP, 2006). The problem was viewed as a "dispute between the upstart profession and the regental authority…and a confrontation over the status of the faculty within the institution of the university" (Doumani, 2006, p. 67). The committee found three matters of concern that were documented and presented in the *Declaration*.

Basis of academic authority. The first matter of concern was "the scope and basis of the power exercised by those bodies having ultimate authority in academic affairs" (AAUP, 2006, p. 292). The discussion focused on the differences between proprietary institutions and institutions established as public trusts. The proprietary institution is characterized as one that is "designed to propagate a specific doctrine prescribed by those who furnished the endowment" (AAUP, 2006, p. 292). Proprietary trustees were therefore bound to implement the terms of the endowment as part of their duties. Universities, colleges, and institutions set up by religious orders and industrialists are included in this category. Institutions in this category,

> do not accept…the principles of freedom of inquiry, of opinion, and of teaching; and their purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators, but rather to subsidize the promotion of opinions held by the persons…who provide the funds for their maintenance. (AAUP, 2006, p. 293)

The committee provided no opinion on proprietary institutions and instead focused on public institutions (AAUP, 2006).

Institutions characterized as public trusts, were governed by trustees who work as representatives of the public interest (AAUP, 2006). Public trusts exemplified the bond between the public and higher education institutions. Without it, this "inextricable link between the public and its institutions faced decreased support from public funds" (Leveille, 2006, p. 13), reduced donations from benefactors, adversarial policymakers, and institutional autonomy being replaced by increased governmental intervention (Leveille, 2006). To maintain these bonds, public universities had to provide an environment dedicated to the propagation of truth and the advancement of unrestricted and unfettered discussion. Institutions of higher education that did not provide these freedoms were "branded as proprietary institutions [that] subsidized the opinions held by the persons [providing] the funds for their maintenance" (Doumani, 2006, p. 68) and, therefore, were not considered public institutions with the rights and privileges granted thereof (AAUP, 2006). Trustees were expected to understand the differences and implications of this distinction.

The nature of the academic calling. The second matter of concern was the status of the professor as an economic commodity and the idea that the university professor was an employee serving at the sufferance of the employer who has the right to control the curriculum and teaching (Doumani, 2006). The principles that were outlined in the report attacked the concept of the university as an ordinary business venture, and of academic teaching as a purely private employment agreement with the goal of redefining

the university-professor relationship. The new relationship characterized professors as appointees to the university rather than employees of the university (Doumani, 2006) who serve their professional function independent of outside interference (AAUP, 2006). The committee's report contrasted the relationship between faculty and trustees to that of federal judges.

> So far as the university teacher's independence of thought and utterance is concerned - though not in other regards - the relationship of professor to trustees may be compared to that between judges of the federal courts and the [president] who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to the control of the president, with respect to their decisions; while of course, for the same reason, trustees are no more to be held responsible for, or to be presumed to agree with, the opinions or utterances of professors, than the president can be assumed to approve of all the legal reasonings of the courts. (AAUP, 2006, p. 295)

The appointee characterization provided faculty with the freedom to serve the public interest as professionals in their fields and instruct their subject without Board interference (AAUP, 2006).

In order for this relationship to be successful, the committee outlined three principles that discussed why academic institutions existed and how they served the public's interest. Institutions existed "to promote inquiry and advance the sum of human knowledge; to provide general instruction to the students; and to develop experts for various branches of the public service" (AAUP, 2006, p. 295). These principles were discussed in relation to the freedom of the faculty to provide instruction without mental reservation in order to give the student the best instruction available, to pursue research and scientific inquiry, and to declare their research results no matter where it leads (AAUP, 2006). The committee determined that,

> [the] responsibility of the university as a whole is to the community at large, and any restriction upon the freedom of the instructor is bound to react injuriously upon the efficiency and the *morale* of the institution, and therefore ultimately upon the interests of the community. (AAUP, 2006, p. 296)

The public university and appointed faculty relationship existed to serve the public interest and to provide an unrestricted and open forum for discussion and debate (Doumani, 2006). The new relationship was the beginning of employment protections for faculty, which evolved into the tenure system (Doumani, 2006).

Infringements of and constraints on academic freedom. The third matter of concern was to decide how these three principles of academic freedom functioned in the social and political environment in which universities and faculty operated. The committee's report reviewed three interrelated potential points of conflict that universities faced as publicly funded institutions and that faculty faced in their dual roles as university employees and citizens with civil rights (AAUP, 2006). The three points of conflict included the role and obligation of the university as a public trust, the obligation of the university to the faculty as an appointee, and the duties and obligations of the faculty as appointees of the university with their right to speak freely inside and outside of the university without persecution or penalty.

To address the first point, the committee stated that public universities should not be in the position of being dependent on any social class, group, legislative favor, or political consideration (AAUP, 2006). The existence of the university as a publicly funded entity in a modern democracy creates the danger that "pressure from vested interests may, sometimes deliberately and sometimes unconsciously, sometimes openly and sometimes subtly and in obscure ways, be brought to bear upon academic

authorities" (p. 297). These pressures could be the direct result of the tendency in a modern democracy of like-minded men to gather in order to influence public opinion on matters that can disrupt and suppress the faculty's search for truth and delivery of knowledge. The acceptance of these principles of academic freedom and the inherent freedoms that faculty have to teach as professionals and experts in their fields were paramount to protecting and defending these rights in a free society (AAUP, 2006).

These rights do not come without obligations on the part of both university and the faculty (AAUP, 2006). One such obligation was the ideal of academic responsibility, which required faculty to be accurate and professional as representatives of the Academy and their profession when exercising their academic freedom and rights to free expression (AAUP, 2006). The *Declaration* conceived of academic freedom not as an individual right to be free from constraints but rather as the freedom based on the standards of their profession (AAUP, 2006). Based on these freedoms, faculty were viewed as experts in their fields and, as such, allowed the privilege of self-regulation in their instruction and research (Doumani, 2006). The committee suggested that the ones best suited to oversee faculty were their academic peers and the external organizations that governed their professional standards (AAUP, 2006) thus implying "academic freedom as a professional freedom" (Doumani, 2006, p. 64).

The disciplines best served by professional oversight were the medical, legal, engineering, and science areas. Well-established internal curricula and external professional standards, theories, and practices were required of all those entering and practicing in these fields. Interpretation and unfettered discussion in these disciplines

were not a concern to the committee as funding and control followed well-established guidelines (AAUP, 2006).

The disciplines of Sociology, Political Science, and Economics, which were the most open to discussion and interpretation, caused the most conflict for public universities and faculty (AAUP, 2006). Dewey pointed out that these disciplines were especially vulnerable as they "dealt face-to-face with the problems of life [and] hence the right and duty of academic freedom [were] even greater here than elsewhere" (Scott, 2009, p. 454). The *Declaration* also warned of the possible conflicts between open discussion and funding issues inherent in these disciplines.

> In the political, social, and economic field almost every question, no matter how large and general it at first appears, is more or less affected by private or class interests; and, as the governing body of a university is naturally made up of men who through their standing and ability are personally interested in great private enterprises, the points of possible conflict are numberless. When to this is added the consideration that benefactors [and] the university are dependent for funds upon legislative favor, it has sometimes happened that the conduct of the institution has been affected by political considerations. (AAUP, 2006, p. 297)
>
> [W]here there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical. The essential point, however, is not so much that the opinion is of one or another shade, as that it differs from the views entertained by the authorities. (AAUP, 2006, p. 297)

These warnings reflected the dilemmas faced by the leaders of public universities as they worked to placate legislators, alumni, and board members, competed for state, federal, research, and private funding, and had defended the rights of the faculty to academic freedom and non-academic free speech. Differences between these groups have been at the center of many AAUP investigations and legal cases and opinions.

The final point of conflict was the professor's intra-university and extra-university rights of academic freedom and free speech. These rights flowed from two principles. The first was that academic freedom was protected by professional standards that guide the curriculum, instruction, research, and reporting of findings and the second that faculty, as citizens, have First and Fourteenth Amendment rights to expression and due process (AAUP, 2006). When faculty have bridged these two principles by bringing non-academic discussions into the classroom or taking academic discussions to the public, the faculty member, the institution, and the judicial system have been placed in the position of deciding whether or not their speech was protected. The *1915 Declaration* provided guidance on extramural utterances in stating that,

> Academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression. But, subject to these restraints, it is not, in this committee's opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties. It is clearly not proper that they should be prohibited from lending their active support to organized movements which they believe to be in the public interest nor desirable to deprive a college professor of the political rights vouchsafed to every citizen. (AAUP, 2006, p. 299)

This statement inferred that faculty members, as citizens, possessed professional, academic, and had individual rights that were protected by the First Amendment when speaking outside of the institution. The position of AAUP on extramural speech was expanded in the *1940 Statement of Principles on Academic Freedom and Tenure* and the *1970 Interpretative Comments*. The Declaration continued with a set of practical proposals to support institutional due process and to use university judicial boards to review academic freedom issues before faculty are dismissed (p. 300).

Practical proposals of report. The committee's report concluded with three practical proposals to be implemented in order to protect administration and faculty from violating or being the victim of violations of academic freedom.

> First: To safeguard freedom of inquiry and of teaching against both covert and overt attacks, by providing suitable judicial bodies, composed of members of the academic profession, which may be called into action before university teachers are dismissed or disciplined, and may determine in what cases the question of academic freedom is actually involved.
>
> Second: By the same means, to protect college executives and governing boards against unjust charges of infringement of academic freedom, or of arbitrary and dictatorial conduct—charges which, when they gain wide currency and belief, are highly detrimental to the good repute and the influence of universities.
>
> Third: To render the profession more attractive to men of high ability and strong personality by insuring the dignity, the independence, and the reasonable security of tenure, of the professorial office. (AAUP, 2006, p. 300)

The proposals provided foundation principles for universities to use in the development of internal policies and procedures for institutional due process and a tenure process to attract, protect, and retain faculty.

The acceptance of the *Declaration of Principles on Academic Freedom and Academic Tenure* by the AAUP provided universities and faculty, for the first time, with an organization and a doctrine that protected their pursuit of truth and defended their academic speech rights (Rudolph, 1990). The protections provided by the *Declaration* included the rejection of the doctrine of employment-at-will and the reinforcement for the premise that employment decisions should be made that are consistent with the definition and principles of academic freedom (Doumani, 2006). The AAUP conjectured that these protections overlapped the First Amendment freedom of speech and association, Fifth Amendment protection against self-incrimination, and Fourteenth

Amendment guarantee of procedural due process, of the faculty as a citizen; and provided legal legitimacy to the principles of academic freedom when the courts handled academic freedom cases (Kaplan & Lee, 1995).

From 1915 through 1939, the AAUP's Committee A on Academic Freedom and Tenure investigated 55 cases (AAUP, January 2011) involving violations of faculty rights that resulted in 15 universities being censured (see Appendix A). These investigations have not only resolved academic freedom violations but also provided an opportunity for the AAUP to review and expand their policies. During this time period, two investigations resulted in clarifications to the *Declaration*. The first case was at the University of Utah in 1915. The termination of a faculty member for criticizing the board of trustees resulted in the development of a definition of what it means for faculty to be equal and independent participants at higher education institutions. The second case, at the University of Louisville in 1927, concerning the dismissal of a faculty member for criticizing the president resulted in the development of a theory of intramural speech and expression as a full-fledged academic freedom (Nelson, 2010). These cases and investigations gave the AAUP relevance and credibility as the U.S. entered World War II and the second period of restrictions on academic freedom.

McCarthyism - Academic Freedom from 1939 to 1960

Historical perspective - the second Red Scare. The end of World War II codified the U.S. as a global power and opened the door for an ideological war between democracy and communism, also known as the Cold War. A number of laws were enacted during this time to maintain national security, to control the flow of immigrants,

and to purge society of people that did not value American beliefs. The Hatch Act of 1939, amended in 1940, banned and criminalized public employee association with political groups who planned to overthrow the government. Two Acts, the National Security Act of 1947 and the Central Intelligence Agency (CIA) Act of 1949, established the National Security Council and the first peacetime intelligence and counter-intelligence agency, the CIA, in order to maintain national security. The Subversive Activities Control Act of 1950 required members of the Communist party to register with the Department of Justice and to provide information, such as lists of their members, for review by the Subversive Activities Control Board for action up to and including the loss of citizenship and deportation (Duke Law Journal, 1965). The Immigration and Naturalization Act of 1952 (INA) lifted the ban on Asian immigrants and changed the quota system from being based on nationality to one based on race and skills, but the new Act remained focused on linking immigration to concerns over national security and national interests (TAHPDX, n.d).

The House Un-American Activities Committee (HUAC), formed in 1938, and the Permanent Subcommittee on Investigations (PSI), formed in 1952 and chaired by Senator Joseph McCarthy of Wisconsin, was the federal government's arm for investigating communist activities and silencing faculty dissent. The time period, 1947 to 1958, was the beginning of the Cold War, also known as the second Red Scare, and began the implantation of the McCarthyist ideology. The era was renowned for its witch-hunts and investigations and prosecutions of people suspected of disloyalty, subversive activity, affiliating with communist organizations, or who were viewed as

sources for damaging information about their colleagues, friends, and neighbors (O'Neil, 2008).

During this period, at least 100 tenured university professors were dismissed or denied tenure "for suspect political affiliations or…for refusing to expose accused colleagues when asked to do so by legislative committees" (O'Neil, 2008, p. 23) and hundreds if not thousands of others' lives were ruined. The issue became especially acute for universities in 1953 when the House Un-American Activities Committee investigators announced a hearing on higher education (Schrecker, 2010). In response, University officials "scrambled for a way to deal with the impending investigations and to turn the political sins of their prospective unfriendly witnesses into academic ones" (p. 51).

The Association of American Universities (AAU, 1953) provided a response in their statement on *The Rights and Responsibilities of Universities and their Faculties*. The statement affirmed that professors, "in all acts of association…accept conventions which become morally binding" (p. 4) and require them to speak with "complete candor and perfect integrity" (p. 4) if called upon to do so. The AAU warned professors that refusing to speak or invoking the Fifth Amendment "cannot fail to reflect upon a profession that claims for itself the fullest freedom to speak and the maximum protection of that freedom available" (p. 4). These actions placed "upon a professor a heavy burden of proof of his fitness to hold a teaching position and [laid] upon his university an obligation to reexamine his qualifications for membership in its society" (p. 4). The AAU continued with a warning to professors with un-American beliefs in stating that

"appointment to a university position and retention after appointment require[d] not only professional competence but involve[d] the affirmative obligation of being diligent and loyal in citizenship" (p.6) and that "present membership in the Communist Party…extinguishe[d] the right to a university position" (p. 6). Endorsement of this statement by AAU member institutions placed the burden on professors to answer to the HUAC for their personal and professional convictions and beliefs or face scrutiny by their institutions up to and including the loss of their tenured position.

Whether faculty spoke before the HUAC or PSI as friendly witnesses who asserted their Fifth Amendment right of self-incrimination or unfriendly ones, most still faced academic investigations by their institutions. In New York, municipal colleges invoked a provision in the city charter meant for corrupt officials to fire unfriendly witnesses. At Ohio State University, a tenured physics professor, Byron Darling, was suspended as soon as he asserted his Fifth Amendment rights and fired after an ad-hoc committee determined that his refusal to answer questions constituted gross insubordination and demonstrated a lack of candor and moral integrity (Schrecker, 2010). These events exemplified the government's and the institution's determination to connect the faculty member's ability to teach with [his or her] extramural political activities and beliefs and to "assault the faculty's political autonomy and freedom of speech" (p. 54).

Loyalty oaths were a less obvious method used to control the faculty speech and political activities. Almost all states required loyalty oaths in some form or another for all public employees with some governmental entities developing their own. One was

the University of California's Board of Regents, which "adopted a disclaimer oath [requiring] faculty to swear not only that they upheld the Constitution [but also] did not belong to the communist Party" (p. 55). The disclaimer oath resulted in the firing of 31 non-signers but, all were reinstated when the California Supreme Court invalidated the University of California oath, as it could not supersede the one used by the state (Schrecker, 2010).

AAUP 1940 *Statement of Principles on Academic Freedom and Academic Tenure.* In 1934, the Association of American Colleges began developing what culminated in the *1940 Statement of Principles on Academic Freedom and Academic Tenure* commonly referred to as the *Statement* (Kaplan & Lee, 1990). The *Statement* sharpened the principles of the 1915 *Declaration* and emphasized the need for full freedom in research, the classroom, and from institutional censorship for faculty extramural expression as citizens (Doumani, 2006). The *Statement* was adopted at the November 1940 annual meeting and confronted the "chilling effect" caused by the Smith Act (1940) (AAUP, 2006).

As with the *1915 Declaration*, the endorsement of the *1940 Statement* occurred as World War II started in 1939 and the nation faced another period of heightened national security. The Smith Act, passed as the Alien Registration Act in 1940, addressed security by restricting immigration and un-American behaviors in the same way the Immigration Act of 1916 and Espionage/Sedition Act of 1917 did. The Alien Registration Act made punishable as a crime the printing, publishing, editing, circulating, selling, and distributing or public display of materials with the intent of

advocating or teaching the overthrow of the government (Donner, November 1952). The restrictions on teaching, advocating, publishing, and circulating provided legislation to control controversial political speech and punish those who spoke on social, political, and economic issues or attempted to overthrow the government.

In response, the AAUP 1940 *Statement* reiterated the *Declaration's* assertion that teachers were entitled (1) to full freedom in research and in the publication of the results, (2) to discuss their subject in the classroom, and (3) to speak as citizens without institutional censor. The *Statement* clarified the roles of the faculty as instructors, researchers, and citizens but continued with two warnings. First, teachers should be careful not to teach controversial matter, which has no relation to their subject. Second, when speaking as citizens, they should be free from institutional censorship and at all times be accurate, exercise appropriate restraint, show respect for the opinions of others, and make every effort to indicate that they are not speaking for the institution (AAUP, 2006). These warnings espoused the political environment in which public institutions operated and made faculty accountable for their classroom and extramural speech. As a result, institutions and professors walked the fine lines between freedom and restraint, publishing and censorship, and patriotic and non-patriotic expression.

The *Statement* was ratified at the combined AAUP and AAC conference in November 1940 with three clarifications. The first clarification affirmed that the ratification was not retroactive and the second provided that all faculty claims made prior to the endorsement of the *Statement* must follow the principles set forth in the *1925 Conference Statement on Academic Freedom and Tenure,* which established the process

to be used for past issues (AAUP, 2006). The third clarification justified the right of the institution to charge and dismiss faculty for extramural speech but that,

> [i]n pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation. (AAUP, 2006, pp. 4-5)

From 1939 through the end of the 1940s, AAUP policy was largely shaped by investigative committees assigned to review complaints and respond to violations (Nelson, 2010). Nineteen institutions were investigated by Committee A (AAUP, January 2011) for academic freedom violations during this time, with 15 institutions censured (see Appendix A.). With these clarifications and structures in place, college executives and faculty entered the McCarthy era with the tools to defend academic freedom.

AAUP missing in action. Despite endorsing the *1940 Statement*, during the next six years (1950 to 1955), there were no AAUP academic freedom investigations (O'Neil, 2008). Fearful of reprisals and severely understaffed (Nelson, 2010), the association and its leadership were considered missing in action and, therefore, ineffective. Adding to these organizational issues was the faculty's "political vacillation and the professional culture of the Academy's emphasis on caution, rationality and judiciousness" (Schrecker, 2010, p. 55) in the wake of McCarthy's assault on civil rights. The result was the second time that the faculty limited or curtailed their free speech and association rights for fear of reprisals.

In 1956, the AAUP reasserted its leadership in the area of academic freedom. Led by General Secretary Ralph Fuchs and President William E Britton, the AAUP began to eliminate the backlog of cases in the association's files. The report at the next annual meeting alleged 18 violations of academic freedom, 6 universities were recommended for censure, and 2 for further investigation. All eight appeared on the 1956 censure list and included Saint Louis University, North Dakota Agricultural College, University of California at Berkeley, University of Oklahoma, Jefferson Medical College, Rutgers University, Temple University, and Ohio State University. When the members at the annual meeting accepted the report and approved the censures, the AAUP reclaimed the ground that it had lost (AAUP, 1989).

Post McCarthyism (1960 to 2000)

Historical perspective – the end of the Cold War and the war on terrorism. The 1960s and early 1970s were periods of turbulence due to the start of the Vietnam War, struggles for racial and gender equality, and the rapid expansion of higher education. With the constraints of the McCarthy era lifted, faculty and students joined in their demands for due process and freedom of expression. Teach-ins, political protests, and freedom movements with activist speakers became commonplace events. Examples included the 1960 Students for Nonviolent Coordinating Committee (SNCC) formed at Shaw University, the 1961 Freedom Riders efforts to register voters in Mississippi, the 1963 Great March on Washington by Martin Luther King, the 1964 Free Speech Movement at the University of California Berkley, and the 1965 peace movement. These events provided the catalyst for change which resulted in the Civil Rights Act of 1964,

the Voter Rights Act of 1965, and the 1965 Executive Order 11246 (Equal Employment Opportunity Commission, September 1965) mandating affirmative action for all government contractors (Brunner & Haney, n.d.), including universities. Students joined a new generation of faculty empowered by the Civil Rights movement and energized the older ones to overcome their fear and to speak out, organize, and demonstrate (Schrecker, 2010) for rights lost in the previous decades.

Campus activism was increased by the addition of new 4-year institutions and community colleges. From 1960 to 1970, enrollments increased by 120%, faculty positions from 331,000 to 551,000 (Schrecker, 2010), and the number of community colleges surged from 412 to 909 (AACC, n.d.). The expansion created a massive force of young academics who had been educated during the McCarthy era and served as faculty, mentors, speakers at demonstrations, and intellectual counselors for the students (Schrecker, 2010). "As a result, universities and colleges became politicized in ways that had never happened before" (p. 61).

During the 1960s and 1970s, new legislation was passed aimed at ending discrimination, funding for education, respecting privacy, and increasing access to education and the workforce. The Civil Rights Act (1964) prohibited discrimination in employment, education, public accommodations and housing and provided the government with the tools to promote equity. The Twenty-Fourth Amendment (1964) and the Voter Rights Act (1965) prohibited the use of literacy tests and poll taxes. The Equal Pay Act (1963), Higher Education Act (1965), Age Discrimination in Employment Act (1967), and Rehabilitation Act (1973) abolished disparities in the

workforce based on gender, age, and disability and provided financial aid to make college affordable for low-income students (Cornell University Law School, n.d.). These Acts were the result of political activism and social awareness and led to an emerging environment that promoted multiculturalism.

This move toward inclusiveness was labeled "political correctness" by those who opposed it. Political correctness was critiqued during the 1980s – the Reagan-Bush era. Schrecker asserts that such critiques went as far as saying that "some of the disciplines, especially in the Humanities, had been so perverted by radicals, feminists, and deconstructionists that their practitioners no longer engaged in the scholarly pursuit of truth" (Schrecker, 2010, p. 106). This type of critique existed in the U.S. prior to the 1980s but remained in the background. As the country became more politically conservative, this critique emerged as a mainstream ideology.

The 1990s witnessed a continuing conservative trend in the media and public and the Academy was viewed as infested with unpatriotic, politically correct, and radical faculty. As a result, support for higher education and individual civil rights declined and forced institutions to be diligent in their oversight of faculty teaching. Political correctness (PC) became the mantra of conservative advocacy groups such as the Americas Trustees and Alumni and the Foundation of Individual Rights in Education as the new prejudice. Challenges from Lynne Cheney and Alan Bloom, past presidents of the National Endowment for the Humanities, found national attention in their condemnation of many university campuses as "islands of oppression in a sea of freedom…depriving an entire generation of the kind of education they deserve" (O'Neil,

2008, p. 238) and academics as "indoctrinating, not educating, their students (Schrecker, 2010, p. 118). These organizations used the power of the media to deliver their messages to the public. In 1991, when debates occurred over national standards for teaching History, national radio talk show host Rush Limbaugh "portrayed the academic community as unpatriotic and was able to persuade Congress to repudiate them" (p. 122). In 1994, when the Smithsonian Institute was planning to exhibit the *Enola Gay* on the 50th anniversary of the bombing of Hiroshima, a group of historians investigated the need for dropping the atomic bomb and were chastised by TV newsman David Brinkley as "haters of [their] own country [who] never pass up a chance to be critical of it" (p. 122). The assault was so thorough and well publicized that "no major figure outside of higher education was willing to stand up for academic freedom" (p. 107).

AAUP activities. The AAUP published the *1964 and 1970 Interpretive Comments* to defend and safeguard academic freedom. Working with the American Association of Universities, the two organizations updated and interpreted the *1940 Statement* to reflect the current challenges to academic freedom, due process, and the status of faculty given the previous decade's court rulings. With the concept that the *1940 Statement* was "not a static code but [rather] a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances" (AAUP, 2006, p. 5), the *Interpretive Comments* refined the principles on the use of controversial material and topics in the classroom and the professor's responsibility when exercising extramural speech. The refinements reinforced academic freedom as a special concern of the First Amendment and academic responsibility as the faculty's

duty to their students and to the public as representatives of their university and profession. On the issue of controversial materials and topics, the *Interpretive Comments* recognized that "[c]ontroversy is at the heart of the free academic inquiry" but "underscore[s] the need for teachers to avoid persistently introducing material which has no relation to their subject" (p. 6). Similarly, on the issue of extramural speech, the *Interpretive Comments* and *1964 Statement on Extramural Utterances* reiterated that "faculty members expression of opinion as a citizen cannot constitute grounds for dismissal" but continued with the caveat that faculty can be dismissed by the administration and university for utterances that raise grave doubts concerning the faculty member's fitness for his or her position (p. 6). The AAUP reinforced these statements in the *1992 Statement on Freedom of Expression and Campus Speech Codes* in stating that the university's

> mission guides learning outside the classroom quite as much as in class, and often inspires vigorous debate on those social, economic, and political issues that arouse the strongest passions. In the process, views will be expressed that may seem to many wrong, distasteful, or offensive. Such is the nature of freedom to sift and winnow ideas. On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed. (AAUP, 2006, p. 37)

The refinements and clarifications presented in these statements closed 40 years of academic freedom efforts and gave universities responsibility for policing academic freedom without court interference.

From 1960 to 2000, the AAUP investigated a record 191 violations of academic freedom (AAUP, December 2009) and censored 143 universities (see Appendix A). The peak of the activity occurred in the 1960s and 1970s when 109 investigations (AAUP,

December 2009) resulted in 82 censures (see Appendix A). These numbers were double the cases investigated and censured in the previous 45 years of AAUP's existence and the result of increased staffing and effective leadership (O'Neil, 2008).

Court cases. Violations of academic freedom and investigations of suspect behavior continued until the end of the McCarty era in 1957. In the 1960s, the courts provided Constitutional status to academic freedom under the First, Fifth, and Fourteenth Amendments (Kaplan & Lee, 1995). The Warren court of 1953 to 1969 became known for its expansion of civil liberties and laws that reduced external political intrusions on faculty, granted institutions freedom from the State (Euben, 2002), and provided faculty with classroom autonomy to serve the public interest. The landmark Supreme Court cases exemplifying these struggles included *Sweezy v. New Hampshire* (1957), *Shelton v. Tucker* (1960), *Pickering v. Board of Education* (1968), and *Connick v. Meyers* (1983).

In *Sweezy* (1957), the New Hampshire Attorney General called the professor to answer questions under the New Hampshire Subversive Activities Act (1951) of his or others' affiliation with the Progressive party. The professor refused to answer questions and was held in contempt. On appeal, courts found that the professor was improperly held in contempt and improperly ordered to disclose the nature of his past expressions and associations because such an order was an unconstitutional governmental interference in the professor's rights safeguarded by the Bill of Rights and the Fourteenth Amendment (*Sweezy v. University of New Hampshire*, 1957). The courts for the first time lauded academic freedom in finding that the government's inquiry into the

subject matter of a University of New Hampshire lecturer's presentation was "unquestionably an invasion of his liberties in the areas of academic freedom and political expression – areas in which the government should be extremely reticent to tread" (Euban, 2002, p. 15). In his concurrence with the decision, Justice Frankfurter quoted a statement by University of Cape Town, South Africa, scholars "categorizing four essential freedoms of a university [as the] freedom to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study" (*Sweezy v. University of New Hampshire*, 1957). The statement was the first recognition of institutional autonomy in an academic decision by the Supreme Court. The notion of the "four essentials" was also recognized in *Ewing* (1985) as the court held that the university's freedom to decide who may study at the university was implied (Goldberg & Sarabyn, 2011).

In *Shelton* (1960), the freedom of association and due process were upheld when the courts invalidated an Arkansas law that required public school and college faculty to "file annually, as a condition of employment, an affidavit listing every organization to which he has belonged or regularly contributed within the preceding five years" (Cornell Law School, 1960, para. 1). Similarly, in *Keyishian*, the courts again upheld a professor's claim to freedom of expression and association by invalidating a state requirement that all employees sign loyalty certificates stating that they were not and had never been affiliated with Communists or the Communist party (*Keyishian v. Bd. Of Regents*, 1967). *Keyishian* placed academic freedom directly under the First Amendment by stating that:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. (Kaplan & Lee, 1995, pp. 301-302)

In *Pickering* (1967), the courts extended the reach of academic freedom when it upheld a public high school teacher's right to free speech outside of the institution (extramural speech) by ruling in favor of the claim of the plaintiff that she was dismissed for criticizing the board of education's financial plans for the high school (*Pickering v. Board of Education*, 1967). The ruling of the appeal court considered the balance of factors between the teacher's freedom of public expression as a citizen and the interest of the state in maintaining an efficient educational system, which became known as the "Pickering Balancing Test" (Kaplan & Lee, 1995). The court ruled that teachers were protected as long as their speech did not damage the legitimate institutional objective of state employers (Doumani 2006). These rulings validated the AAUP's principles of extramural speech in that faculty "are obliged to be accurate and to exercise appropriate restraint of external speech" (p. 86). *Pickering* completed two decades of key academic freedom cases and civil rights activities that ended loyalty oaths and recognized academic freedom as a protected First Amendment right (Euban, 2002).

From 1970 to 2000, the courts became more conservative and refocused on issues related to public and private speech, classroom instruction, research and publication, teacher privacy, and institutional affairs. The decisions considered "not only the content but also the manner, time and place in which it [was] delivered" (Kaplan & Lee, 1990, p. 305). The landmark case, *Connick v. Meyers* (1983), provided Supreme

Court opinions concerning the employees First Amendment protections of public and private speech.

In *Connick* (1983), the court denied the claim of the plaintiff (Meyers) that his termination for circulating a questionnaire concerning internal office affairs violated his First Amendment rights (Kaplan & Lee, 1995). "The issue was whether *Pickering* protected public employees who communicated views to office staff about office personnel matters" (p. 394). The court refused to apply *Givhan* and ruled that Meyers spoke not as a citizen but rather as an employee on private matters. The limited First Amendment interest involved in the case did not require the supervisor to tolerate action which he reasonably believed disrupted the office, undermined his authority, and destroyed close working relationships (Connick v. Meyers, 1983). Although *Connick* appeared to limit protection provided by *Pickering*, the court emphasized that its opinion was limited to the facts of the case and that future courts must be vigilant to the facts of each (Kaplan & Lee, 1995). The *Pickering/Connick* test is referenced where the decision of whether public employee speech, made publicly and privately, is protected by the Constitution.

A century that began with the formation of the AAUP and the reaffirmation of faculty rights ended with the courts upholding both institutional and faculty academic freedom as protected under the Constitutional. However, the right of the institution to govern faculty intramural and extramural speech continued to be challenged by the faculty's claim to the Constitution's right of free expression and due process. These

issues led to new challenges and conflicts that weakened the position of the professorate at the turn of the century and the start of a new era.

Neo-McCarthyism (2000 to 2012)

Historical perspective. On September 11, 2001, Americans awoke to deadly terrorist attacks on the World Trade Center, revered as a symbol of prosperity and economic might, and the Pentagon, a universally recognized emblem of U.S. military strength and global domination (Pyszczynski et al., 2002). The September 11, 2001 headline, "Nothing Will Ever Be the Same" (Altman et al., 2001), as proclaimed by *Philadelphia City Paper*, exemplified the national moment. It designated September 11th as the dividing line between the nation's feeling of normalcy, security, and prosperity prior to the attacks and those of disbelief, fear, anxiety, and anger afterward (Pyszczynski et al., 2002). So much, that "in November 2001, 40% of all Americans believed that they or a family member [would] be the victim of a future terrorist attack [with] 74% [believing] that such an attack was quite likely in the near future" (p. 95).

Historically, the government's domestic arsenal in times of crisis like this has included secrecy, surveillance, and suppression (AAUP, November 2003). The government repeated history when it passed the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act). The Act provided the catalyst for sweeping legislation that had many detrimental consequences for faculty speech and association rights. The Act allowed the suppression of controversial materials, topics, and research by requiring federal review of sensitive research.

According to Doumani, the result has been "take back the campus campaigns by well-funded and politically connected private conservative advocacy groups [whose aim is to] influence the production of knowledge by promoting certain lines of inquiry [within the Academy] while delegitimizing others" (2006, p. 14) with "attacks on specific scholars, course offerings, and programs of study" (p. 15). Advocates such as David Horowitz, Daniel Pipes, and Lynne Cheney have established organizations such as Students for Academic Freedom and their *Academic Bill of Rights* (ABR), NoIndoctrination.org, Campus Watch, and the American Council of Trustees and Alumni (ACTA) to stifle thought, limit speech, and silence faculty (Gerstman & Streb, 2006). Horowitz, like his counterparts, asserted that the majority has become "dispossessed of its right to speech because that right has been taken over by a radical faction" (Goodman, 2006, p. 118). To resolve the problem, each advocacy organization focused on different on-campus groups, disciplines, and agendas. The Students for Academic Freedom's *Academic Bill of Rights* focused on student free speech and stated that their mission is "the creation of appropriate conditions and opportunities on the campus as a whole as well as in the classrooms and lecture halls [that] reflect the values [of] pluralism, diversity, opportunity, critical intelligence, openness and fairness" (Students for Academic Freedom, para. 1) and to promote "intellectual diversity that protects and fosters independence of thought and speech" (para. 2). Campus Watch focused on Middle Eastern studies programs in North America and states that their mission is to identify "analytical failures, the mixing of politics with scholarship, intolerance of alternative views, apologetics, and the abuse of power over students"

(Campus Watch, 2011, para. 1). The ACTA focused on alumni, donors, trustees, and education leaders across the United States and the mission to "uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives a philosophically rich, high-quality college education at an affordable price" (ACTA, n.d., para. 1).

ABR's lack of success has spawned similar legislation from the Students for Academic Freedom titled the "Student Bill of Rights" and "Intellectual Diversity." The legislation was introduced in 10 states in 2007 and carried much of the same language as ABR (AAUP, 2007b). Most institutions expected these bills to die in committee but some state legislatures, such as Texas, are "encouraging action to be taken at the campus level" (Byrd, 2007, para. 2). The success and/or failure will not stop these attempts to infuse conservative values into their version of academic freedom and to use the students and national security agenda to infuse conservative values into the curriculum.

In 2006, Horowitz continued his mission and published *The Professors: The 101 Most Dangerous Academics in America*, which included short essays discussing the ways each professor uses his or her classroom to indoctrinate students. The book jacket promised information about professors who "say they want to kill White people," "support Osama bin Laden," and "defend pedophilia" (Jaschik, February 2006, para. 4). An analysis of *The Professors* by Free Exchange on Campus, a collation of academic and civil liberties groups, concluded that "the majority of the profiles in Mr. Horowitz's book contained no evidence of professors' in-class conduct whatsoever" (p. iv), that accusations were "based exclusively on things professors have said or written outside of

their classrooms" (p. iv) and that "Horowitz manipulated facts to make them fit his arguments" (p. vi).

In 2002, the American Council of Trustees and Alumni report, *Defending Civilization: How Our Universities Are Failing America and What Can be Done About It*, was published. The report provided the university, disciplines, lecture quotations, and the names of faculty who the organization believed were intimidating students "if they question[ed] politically correct ideas or failed to conform to a particular ideology" (Martin & Neal, 2002, p. 5). The original report contained 117 faculty names but was retracted after angry protests by faculty associations (Doumani, 2006). ACTA reports in subsequent years have provided online report cards on the organization's assessment of academic freedom at several public universities and colleges including the University of North Carolina (2005), the University of Georgia (2008), the University of Illinois (2009), and the University of Minnesota (2010). The reports focused on "four key areas of the public's interest: what students are learning (the curriculum), whether the marketplace of ideas is vibrant (intellectual diversity), how the universities are run (governance), and what a college education costs (affordability)" (ACTA, 2010). These groups have successfully assumed the AAUP's and other professional organization's terms and language such as "public interest" and "academic freedom" to support and promote their agenda.

Federal regulation and the courts. The most controversial legal cases of this period have been focused on the conflicts between cultures and ideologies and their representation both inside and outside of the academic community. Legislation such as

the Patriot Act and political pressures from conservative and religious advocacy groups have brought these issues to the forefront. These issues have resulted in legal cases and campus controversies that have forced institutions to evaluate their cultural values and ethical responsibilities to their mission and the Academy. The landmark cases and events related to the survival of controversial programs, balance of the curriculum, germaneness of classroom discussions, research and federal compliance, faculty speaking as employees, and extramural free speech and due process provide insight into their effect on academic freedom.

Balancing the discussion. Advocacy groups such as the Students for Academic Freedom, National Association of Scholars, and American Council of Trustees and Alumni have learned how to exploit faculty speech and use the fears created by 9/11 to support their conservative agendas to end the political abuse of the university, support intellectual freedom, and defend American civilization (Students for Academic Freedom, n.d.; National Association of Scholars, 2011; American Council of Trustees and Alumni, n.d.). Past experience has informed them that the court system is not friendly to attacks on intramural speech. So instead, the power of technology and the media provides them with a conduit for an echo-chamber of messages that is sent to campus-based groups stereotyping higher education as being "politically correct." This closed network of communication offers faculty and students a means to report complaints, receive legal advice, and publicize incidents of indoctrination (Cavalho & Downing, 2010) with limited discussion or feedback from the faculty being accused. Circulated widely and without notice to legislators, board members, alumni and parents,

universities are pressured to react and spend time responding to claims better handled internally.

Faculty speaking as employees. Two landmark cases concerning the free speech of faculty as employees, *Schrier v. University of Colorado* (2005) and *Ceballos v. Garcetti* (2006) were decided during this time. These cases provide the potential to undo the definition of a faculty member as an appointee established by the 1915 *Declaration*. In *Schrier*, the courts differentiated between academic free speech and speech on university related matters that are a public concern. Dr. Robert Schrier was a tenured faculty member in the University of Colorado's School of Medicine and chair of the department. In October of 2002, *Schrier* was stripped of his chairmanship. He contends that this action was taken because he spoke out against the university's plan to move the medical school (*Schrier v. University of Colorado*, 2005). In 2005, the District court ruled in favor of the university recognizing academic freedom as a special concern of the First Amendment but distinguishing academic speech from speech outside of the classroom when it pertains to an issue of public concern (Levinson, 2007). The "court concluded that the administration's interest in suppressing *Schrier*'s speech outweighed his right to free expression" (p. 5). The ruling was issued before the Supreme Court decision on *Garcetti* but demonstrated how one district court differentiates between intramural and extramural speech on university matters.

In *Garcetti* (2006), the Supreme Court ruled that when public employees make statements pursuant to their official duties, they are not speaking as citizens and can therefore face disciplinary action by their employer even if they are speaking on an issue

of public concern (Levinson, 2007). The *Garcetti* decision added a preliminary step to the *Pickering* balance test. "The first step determines whether the employee spoke as a citizen on a matter of public concern" (Griffin, 2007, p. 153). The second step invokes the *Pickering* test "to determine whether the employer had a reason to treat the public employee differently from a member of the general public" (p. 153). The two-part *Garcetti* test created a measure for employee speech and provided government employers with broad discretion over their operations (Griffin, 2007). Griffin comments that this "test eliminates judicial balancing and replaces it with definite boundaries that are clear to both the employee and employer" (p. 54).

The question of whether *Garcetti* affects teaching and scholarship was raised by Justice Souter who expressed the hope that the majority decision "does not imperil the First Amendment protection of academic freedom in public colleges and universities" (DelFattore, 2011, para. 7). The court responded with the "*Garcetti* reservation" recognizing that the court's analysis did not apply in the same manner to a case involving speech related to academic scholarship and classroom instruction (DelFattorre, 2011). The *Garcetti* decision still creates uncertainties for faculty when they speak as department chairs or committee members on non-academic issues. The result could be that faculty refrain from participating in decision-making and are silent on issues considered controversial. As such, faculty must be especially careful when speaking both inside and outside the classroom on non-academic issues as the next two cases demonstrate.

Employee speech rights were exemplified in two termination cases, *Mayer v. Monroe County Community School Corporation* (2007) and *Payne v. University of Arkansas* (2006). In *Mayer* an elementary school teacher was asked by a student whether she participated in political demonstrations. Mayer responded that she had honked her horn in support of a peace demonstration. When parents complained, the principal reprimanded her for taking a political stance and her contract for the following year was not renewed. Mayer believed her classroom speech was the reason that her contract was not renewed and filed a lawsuit claiming a First Amendment violation. The district court ruled in favor of the school district stating that "the teacher had a right to express her views on the subject, but [that] the right was qualified in the workplace by the requirement that expression not disrupt an employer's business unduly" (Mayer v. *Monroe County Community School Corporation*, "Case Summary," 2007, para. 2). On appeal, "the court held that public-school teachers had to follow the approach prescribed by principals [and that the] Constitution did not entitle teachers to present personal views to captive audiences against the instructions of elected officials" (para. 2). Even though university instruction was irrelevant, the court "remarked that because college instructors are hired to instruct students, the court has no doubt that employers are entitled to control speech from an instructor to a student during working hours" Levinson, 2007, p. 3) which demonstrated how courts might approach higher education institutions under Garcetti (Levinson, 2007).

Similarly in *Payne*, the court ruled in favor of the university. Diana Payne, a tenured faculty member, sent an email to the university's senior vice chancellor

explaining her concern about a university policy concerning workload, which she felt reduced university donations. Payne was terminated soon after and she filed a retaliation lawsuit against the university. The Court used *Garcetti* to determine that "government employers, like private employers, need a significant degree of control over their employee's words and actions, and therefore, the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities" (*Payne v. University of Arkansas*, 2006, para. 1). The court ruled that the email was not protected speech even though it did not pertain to a concern of public interest namely the university policy (Levinson, 2007).

Extramural speech. Two cases, *United States v. Al-Arian* (2008) and *Churchill v. University of Colorado at Boulder* (2010), demonstrate the high-stakes legal and political environments in which universities operate. The cases exemplify the speed at which the media are able to track and report news, and the influence that legislators, alumni, and boards have over public institutions when faced with controversial extramural speech by tenured faculty members. The *Al-Arian* and *Churchill* cases also illustrate how extramural speech initiated internal due process methods to dismiss tenured faculty members and how the courts have deferred their decisions in support of the institution's academic freedom as a public interest.

United States v. Al Arian. In the fall of 2001, Dr. Sami Al-Arian, a Kuwaiti-born, University of South Florida (USF) computer engineering professor, appeared on the FOX television show *The O'Reilly Factor*. He was interviewed about his pro-Palestinian terrorist ties (O'Neil, 2008). Within hours, the university was flooded with

calls from angry alumni, parents, and local citizens (Gerstmann & Streb, 2006). Two days later, Al-Arian was placed on paid leave for his safety and a month later the USF Board voted to recommend his dismissal. The blatant disrespect for his due process was charged in a grievance filed by the faculty senate to which there was no response. The paid leave turned into a suspension. To avoid AAUP censure, the USF president filed a lawsuit in district court seeking the dismissal of Dr. Al-Arian for activities that undermined the orderly and effective functioning of the university. The case was moved to a federal court where the judge faulted USF for not following due process and recommended the use of the university's grievance and arbitration procedure. Then, in February 2003, Al-Arian was arrested by federal authorities for raising funds and providing material support for Islamic terrorist organizations in violation of the Patriot Act. The arrest and 50-count indictment was supported by wiretaps and information gathered legally under Electronic Communications Privacy Act and Foreign Intelligence Surveillance Act. A week later, Al-Arian was fired from his USF position without ever being found guilty of anything (AAUP, November 2003). "The notice of termination stated that he had used USF's name and resources for illegal and improper purposes" (Vroom, 2003, para. 3).

From 2003 to 2008, Al-Arian was imprisoned. The six-month trial in 2005 featured 80 witnesses and 400 transcripts of phone conversation. At the end of the prosecution's case, Al-Arian's attorneys rested without offering a defense. The jury acquitted him on 8 of 17 counts and deadlocked on the others with a majority voting for

acquittal (Ave, December 2005). The case exemplifies the line that faculty walk when extramural activities collide with legislators, university alumni, and taxpayers.

Churchill v. University of Colorado at Boulder. Soon after 9/11, Ward Churchill, chair of the Ethnic Studies department and a professor in American Indian Studies at the University of Colorado (UC), published an essay titled *On the Justice of Roosting Chickens* on an obscure website (AAUP, December 2010). Churchill (2003) argued that U.S. foreign policy had provoked the attacks on the World Trade Center and suggested that the people working in the financial services companies in the Twin Towers were complicit. He labeled these people as a "technocratic corps at the very heart of America's global financial empire" and called them "little Eichmanns" (para. 24), a reference to the mastermind of the Holocaust, Adolf Eichmann, and stated, "the hijackers were not cowards as they had manifested the courage of their convictions" (para. 25). Just prior to a lecture at Hamilton College in February 2005, a student found the essay and published it in the student newspaper, which was picked up five days later by the *Syracuse Post-Standard* (Schrecker, January 2010). The controversy soon spread outside of Hamilton with Fox news talk show host, Bill O'Reilly, "claiming that Churchill should be arrested for sedition and calling on all of his viewers to demand that Hamilton cancel Churchill's appearance" (p. 3). The speed of the media action provoked an enormous amount of attention at Hamilton College which resulted in President Joan Hinde Stewart relenting on her principles of academic freedom and cancelling Churchill's lecture for safety and security reasons (Schrecker, January 2010).

On February 1st, Colorado Governor Bill Owens wrote a letter to the university president demanding Churchill's resignation. The letter was followed by a legislative resolution, which unanimously demanded that Churchill be fired. In response, Churchill relinquished his position as department chair but not his tenured faculty position (Schrecker, January 2010). UC-Boulder President Elizabeth Hoffman "invoked the McCarthy era as she cited the threat to academic freedom that Churchill's case might pose" (p. 4). Three days later Governor Owens and the Board of Regents forced Hoffman to resign for refusal to fire Churchill and replaced her with former Colorado Senator Hank Brown who was an early supporter of the ACTA and an entrenched member of the Republican Party (Schrecker, January 2010).

Schrecker (January 2010) reported that, "in all official statements and press releases, both the regents and the president [reiterated that Churchill] like every citizen of the United States had the right to make controversial political views" (p. 19) and that they were not punishing him for his "little Eichmanns statement" (p. 19). The statements not only emphasized the use of due process to remove a tenured faculty member and the institution's right to academic freedom but also provided distance to the president and the Board from the real academic freedom issue at hand; Churchill's right to extramural speech as an academic. Soon after his termination, Churchill filed a suit against UC in Denver district court. The *Churchill* case is analyzed at length in Chapter ten.

Institutional academic freedom. *Grutter v. Bollinger* provided Supreme Court opinions that recognized university control over academic decisions. The cases concerned admissions policies at the University of Michigan and not academic free

speech specifically, but implied a "degree of deference" to the university to decide what speech should be censored and valued within the institution's ideals (Goldberg & Sarbyn, 2011). The Supreme Court left the lower courts to determine the extent that state or federal laws should interfere with the institution's autonomy and its ability to make academic decisions.

Grutter v. Bollinger. In *Grutter*, a University of Michigan law school applicant sued the law school, university regents, and university officials, claiming race discrimination in the school's admission policy. The trial court concluded that the policy was unlawful and granted an injunction however the United States Court of Appeals for the Sixth Circuit reversed the judgment and vacated the injunction. The Supreme Court upheld the circuit court's decision that the law school's narrowly tailored use of race in its admissions decisions did not violate the Equal Protection Clause. In upholding the law school's policy, the *Grutter* court provided "Constitutional deference to a university decision" as long as the decision was made on academic grounds. If so, the university is provided a degree of deference as the decision is presumed to have been made in good faith, absent showing the contrary as defined in *Bakke* (Goldberg & Sarabyn, 2011). The court also invoked the "four essentials" from *Sweezy* and *Ewing*, leaving universities empowered to make core and academic decisions on intramural and extramural speech when it conflicts with the institution's pursuit of their mission. The Supreme Court left the details to the lower courts to determine the extent to which the *Grutter* court meant what it said (Goldberg & Sarabyn, 2011). Clarification remains an open issue.

AAUP. As discussed, the AAUP was proactive in maintaining a watchful eye on the violations and challenges of the rights of faculty. Investigations and reports on violations of academic freedom continued to shape AAUP policy. Since 2000, Committee A, the AAUP's, largest and oldest standing committee, has published 16 clarifications and position statements on issues related to academic freedom which include tenure, academic boycotts, research, student rights, faculty speech, outside speakers, overseas campuses, and political controversies (AAUP, n.d.).

In addition, the AAUP formed three special committees for limited time "periods, to deal with specific issues that were either outside the scope of the AAUP's standing committees or required sustained special attention" (AAUP, n.d., para. 1). The committees investigated issues related to "Academic Freedom and National Security in a Time of Crisis," "Hurricane Katrina and New Orleans Universities," and "The Status of Librarians in the Academy." Each focused on a specific event and reported on how it had impinged faculty academic freedom.

The special committee assigned to review national security in times of crisis was established on the first anniversary of the event of September 11, 2001. The committee assessed the risks to academic freedom and free inquiry that faculty are facing as a result of the nation's response to the attacks (AAUP, November 2003) and more specifically the effects that the USA Patriot Act has had to empower federal authorities with the right to access academic business information such as library records and to restrict university employees from revealing the act (AAUP, November 2003). The report provided a detailed review of the USA Patriot Act and highlighted the cases and incidents since

9/11 that have resulted in external pressure being used to force institutions to terminate faculty for extramural speech without due process, restrict classroom speech, and deny foreign students and speakers access to U.S. higher education opportunities (AAUP, November 2003). The report concluded with 11 national and 8 campus-level recommendations to protect academic free speech due to "society's failure adequately to protect those values during the McCarthy era" (p. 57).

These national and campus recommendations acknowledged the need for security and methods to deal with the terrorist threat but explained that the basic precepts of academic freedom were not negotiable (AAUP, November 2003). Specific to faculty speech, the report called for collaboration between academic and disciplinary associations and university leaders to support Congressional measures to (1) reduce threats to academic freedom, (2) oppose efforts to expand measures to protect national security, and (3) exercise vigilant and effective oversight of the power delegated to federal agencies by the USA Patriot Act (AAUP, November 2003). The report recommended communication of these issues widely to the academic community and public via conferences, faculty unions, and other media (AAUP, November 2003).

The campus-level recommendations focused on the development and communication of internal policy. The report called for the faculty to be vigilant in the monitoring of changes "to institutional policies on academic freedom and free expression to ensure that the policies contain adequate protection against political pressures freedom within and outside the institution" (AAUP, November 2003, p. 57). To support this effort, the report recommended full and meaningful faculty participation

in policy development, wide communication of policy changes, improved contact between faculty organizations and the internal departments that maintain and interpret institutional policies, and a heightened awareness of the sensitive documents being turned over to government officials (AAUP, November 2003). The recommendations concluded with a call for faculty and students.

> Faculty, faculty unions, and other faculty organizations should use the mechanisms available to them…to inform the entire university community of faculty concerns about national security measures and the effect of these measures on academic freedom and free inquiry of faculty, staff, and students. There must also be resistance to pressures from individuals and groups, on and off the campus, who seek to bar speakers whose views they oppose, to ban events for purposes they loathe, or to punish or silence faculty, students, and staff whose opinions they cannot abide. (AAUP, November 2003, p. 58)

During the neo-McCarthy era, the calls to unify were heard and the AAUP acted upon them. AAUP's Committee A investigated 30 violations of academic freedom (AAUP, January 2011) with 20 resulting in censure (see Appendix A).

Figure 2.1 illustrates the number of institutions that the AAUP has censured since 1930. The chart depicts the increased number of censures during the pre-McCarthy and McCarthy periods to a peak in the post-McCarthy period and the steady decline starting in 1980 and continuing through 2012. Noteworthy is the fact that the number of institutions censured between 2000 and 2012 was almost equal to the 1950s. The main reason in both periods was the increased influence of government caused by fear (communism and terrorism) and the increased use of each period's conservative courts to control unwanted academic intramural and extramural speech. Other contributing factors include the media's ability to discover and report on campus events quickly and

the hiring of part-time, at-will, non-tenured faculty nationwide. These factors have resulted in faculty being more cautious when participating in shared governance and faculty chilling their speech to reduce their exposure to controversy and discipline.

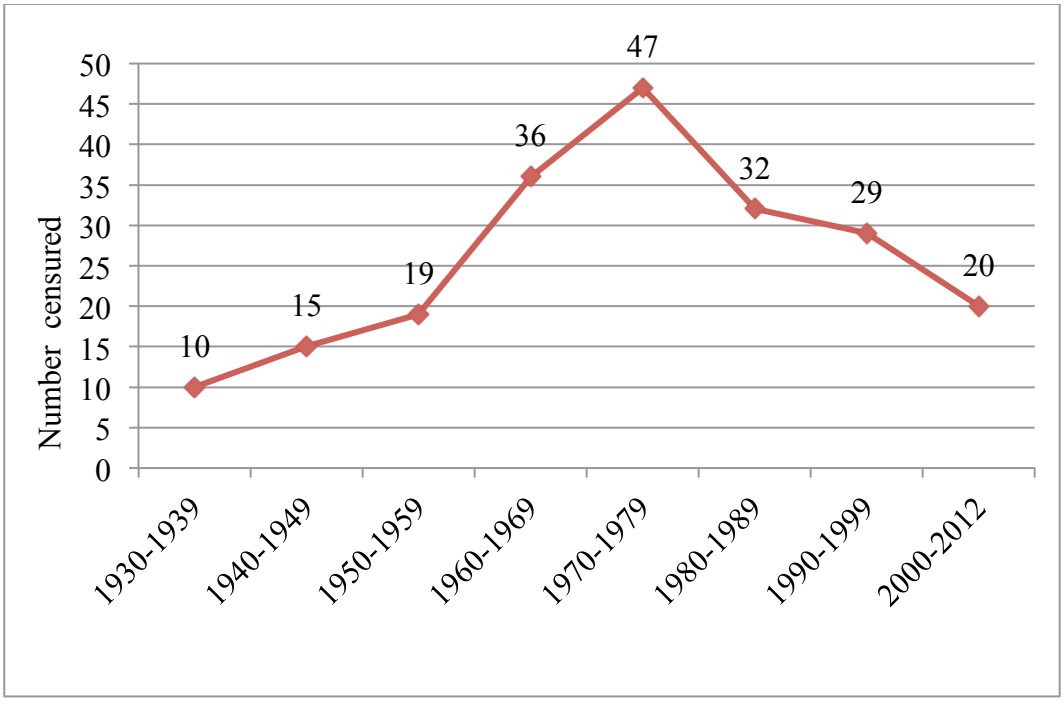


Figure 2.1. Number of Institutions Censured by Decade

In defense, the AAUP's Litigation Committee has filed amicus briefs "in cases involving academic freedom, tenure, discrimination, affirmative action, sexual harassment, and intellectual property issues" (AAUP, December 2010, para. 1). The committee provided expertise in such matters as employment law, education law, the First Amendment, intellectual property, labor law, and civil liberties and has filed 47 amicus briefs in federal and state courts (AAUP, December 2010; AAUP, 2004). The briefs were filed in conjunction with organizations such as the Thomas Jefferson Center for the Protection of Free Expression, American Civil Liberties Union (ACLU), the

National Coalition Against Censorship (NCAC), and the Foundation for Individual Rights in Education (FIRE) on cases which include *Otero-Burgos v. Inter-American University (2009)*, *Hong v. Grant (2007), Schrier v. University of Colorado (2005)*, *Saxe v. Board of Trustees of Metropolitan State College of Denver (2005)*, and *Pittsburg State University/Kansas NEA v. Kansas Board of Regents, PSU, PER*(2003) (AAUP, December 2010).

Conclusion

This discussion of the evolution of academic freedom since 1890 designated four distinct time periods in which universities and faculty faced criticism for their controversial classroom speech and opinions. On September 11th, the new wave of challenges by conservative advocacy groups, the courts, and legislation by state and federal government began to cloud the bond between faculty academic intramural and non-academic extramural speech. These groups goal continued to be a separation of academic and non-academic speech based on who was speaking, what was said, and the location of the speech. By censoring and silencing the offenders, these organizations intend to enforce the "idea that politics and scholarship are separable entities" (Scott, 2009, p. 477) and are not compatible. As occurred in each period, these efforts continue to test disciplines in which current events and controversial issues are discussed.

To this end, Nelson asserted that, "the future of academic freedom is both uncertain and unstable [and that] faculty now stand on weakened cultural and political ground" (2010, p. 166). Courts continue to profess the place of academic freedom as a Constitutional right while at the same time universities increase their legal rights to

silence the intramural and extramural speech of faculty. As Cole (2005) stated, these actions "coupled with other actions taken by the federal government in the name of national security, suggest that we may well be headed for another era of intolerance and repression" (p. 5). Using court decisions and interviews and surveys of faculty at U.S. flagship public universities, this study analyzes the opinions of the courts and the academic environment to determine whether faculty are being silenced since 2000 and, specifically, in the post-9/11 era.

Chapter Three: Methodology

This chapter provides the methodology used to study the effect that events like the September 11th attacks and the subsequent efforts by legislators, conservative advocacy groups, and the courts have had on the intramural and extramural speech of faculty since 2000. The problem statement emphasizes the rationale for the study and presents the research questions on which the mixed methods focuses. A postmodern approach is used to guide the research as it provides a framework for deconstructing the discourse between the opinions of the courts and the faculty's views of the current academic environment. A brief discussion of the participants interviewed and surveyed provides an overview of the faculty characteristics and the degree of involvement expected during the study. A diagram of the research design illustrates the flow of the study and along with a discussion of the data sources and methods of analysis, provides a complete outline of how the study proceeds. This methodology allows the research to follow a structured path to determine the effect court decisions and federal, state, and local events have had on faculty intramural and extramural speech rights, when faculty speak as public university employees and U.S. citizens.

Problem Statement and Research Questions

Academic freedom currently faces the most serious challenges and setbacks since the McCarthy era (Doumani, 2006). The hasty passage of the USA Patriot Act in 2001 and the subsequent efforts of well-funded and politically-connected advocacy groups, have threatened the faculty's academic right to free and open inquiry and research; to design curriculum and teach freely within their university or college

disciplines; and to unfettered extramural utterance and action as citizens (AAUP, 2006). As the *1915 Declaration* infers, faculty in the social, political, and economic fields are the ones most likely to speak and express diverse opinions that have resulted in punitive actions by individuals and organizations internal and external to the university (AAUP, 2006). Their successful portrayal of the higher education system as "subverted by unpatriotic, politically correct, and radical faulty" has "undermined support for public education [and] deprived the academic profession of its previously respected voice within the American political discourse" (Schrecker, 2010, p. 122). As O'Neil (2008) stated, "[t]hose beyond the campus need to appreciate why the silencing or dismissal of a single faculty crackpot or nutcase potentially effects the entire community" (p. 281). The question of whether these actions, a decade after September 11, 2001, dominate the discourse and chill academic freedom in the social sciences, humanities, and communications fields requires further study.

The mixed methods study focused on the changing academic landscape since 2000. The sources of data included court cases, interviews of select university faculty, and online surveys of faculty at public U.S. universities. The data analysis allowed dominant patterns and themes to be extricated from both the legal and practical spectrums by providing the court's case logic and the faculty perspective of current academic freedom issues. The faculty surveys improved the analysis as the diverse sample of faculty at a public university located throughout the U.S. provide further clarity and validation of the patterns and themes found in the cases and interviews.

Throughout these analyses, the study focused on intramural and extramural speech to address the following research questions.

1. How have federal, state, and local events affected academic freedom since 2000?
2. How have these events changed the way universities and faculty handle intramural speech?
3. How have these events changed the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee?
4. How have these events affected the faculty's ability to defend their academic freedom since 2000?

Analytical Paradigm

A postmodern approach was used to deconstruct the changing academic and legal climate of faculty free speech. Postmodernism was selected because it allowed the researcher to engage reflexity, fragment authority, and to interrogate the notion of consensus in order to expose binaries (Hassumani, 2002). Deconstruction is about recognizing the resident hierarchy within a text and flipping it. As a strategy, deconstruction begins with a close reading, articulates the "center" of a text, and then goes on to notice the other meanings also resident within the text that are marginalized or silenced by the "central" meaning. In her preface to Jacques Derrida's *Of Gramatology*, Gayatri Spivak offers the following definition of deconstruction:

> To locate the promising marginal text, to disclose the undecidable moment, to pry it loose with the positive lever of the signifier, to reverse the resident

> hierarchy, only to displace it; to dismantle it in order to reconstruct what is always already inscribed. (1974, p. lxxvii)

This study found the following major binary opposition operating within the overarching text of academic freedom: court cases and faculty voices. Within academic freedom, court cases were centralized and faculty voices were pushed to the margins. The study analyzed and discussed the centrality of the court cases but then went on to give voice to that which had been silenced. Using deconstruction, the study parsed meaning from the diverse samples and data to qualify what faculty academic freedom is and is not, post-2000.

Other binaries such as discourse and silence, conformity and freedom, oppressor and oppressed, were analyzed to surface inherent hierarchies within the themes and to discuss how the dominant discourse privileges language and actions to silence dissenting voices and marginalizes nonconformists. The duality of the language that was and was not privileged allowed patterns and themes to surface with some proving to be more prevalent than others. As binaries emerged, the postmodern approach also provided a way to identify them as separate entities or "polycenters" with dominant beliefs and inherent hierarchies of their own. Hogue stated that the principle of polycentrism "advocates for the existence of independent power within a singular political, cultural, or economic system [with its own] hierarchy system that privileges a center with a subordinate periphery" (2003, p. 3). Polycentrism allowed unique aspects and individual voices such as those from the analysis of case logic and interviews to emerge as themes with distinct dominant beliefs, structures, norms, and prejudices. Understanding these themes and their differences allowed the researcher to interpret the data from the

margins, understand the power relations (Hogue, 2003), and characterize the academic landscape from multiple perspectives.

Need for Study

Since 2000, a number of federal, state, and local events have changed the landscape of the university and academic freedom. The Great Recession of 2008 provided a unique opportunity for administrators, politicians, and pundits to change university structure, alter employment policies, and eliminate unwanted departments and programs (Schrecker, 2010). Coupled with the conservative mood and the emphasis on national security, the result has been a concerted effort to change the tenets of free speech and the academic freedom at public universities. During the Red Scare, the McCarthy era, and the culture wars of the 1980s and 1990s, these efforts were countered by court cases, appeals, and protests by the faculty and students in order to emphasize the importance of providing an academic environment that was open to controversial ideas and freedom to express dissenting opinions. As a result, academic freedom continued to be upheld as a right necessary for the advancement of knowledge in a free society. But, once again, faculty found their rights challenged.

In this era, universities, administrators, and faculty continue to face pressures from government, community leaders, and the media to repress classroom discussion considered radical or off topic, publications that criticize current events, and extramural speech deemed un-American. The decisions by the courts to challenge intramural speech in *Schrier* (2006), *Garcetti* (2006), *Hong* (2007), and *Adams* (2010), extramural speech in *Churchill* (2010), and academic freedom's definition in *Grutter* (2003) provide

examples of faculty and public employees who have not been silent and been chastised for their political opinions. Some say that academic freedom is being defended in the court system (O'Neil, 2007). But, the conflicts resurface whenever America's security and belief system are threatened (Schrecker, 2010). This study reveals the binaries and resulting resident hierarchies within these conflicts and provides an analysis of the academic environment to determine whether intramural and extramural speech is being protected.

Site

The two-phased study was conducted at various locations using in-person, phone, and online tools. The first phase of the study was a qualitative analysis of the logic behind select court case decisions and of the faculty interviews. The analysis of the cases used resources obtained from the legal databases. The second phase of the study was the interviews of 19 full time public university faculty, conducted in-person or by phone at locations convenient to the interviewees. All interviews were digitally recorded, transcribed by a bonded service, and coded using NVivo, a qualitative data analysis package. The second phase also included a quantitative component consisting of a seven question survey of the 19 faculty interviewed. All survey data was uploaded to MS Excel for analysis and reporting.

Sources of Data

Full transcripts of the six selected court cases were obtained from the LexisNexis database and law libraries. Briefs related to the six cases were accessible online from the AAUP, ACLU, FIRE, and the Thomas Jefferson Center for the Protection of Free

Speech and provided discussions of the legal arguments and perspectives raised in the court cases.

The initial stratified sample of 23 interviewees was selected by searching public university governance websites from each of the Supreme Court districts. Each potential interviewee was sent an email introducing the researcher, explaining the purpose of the study, and requesting their participation in the study. Faculty who declined were asked to recommend faculty who could be contacted. The snowball sampling process continued until 19 faculty agreed to be interviewed. After each interview, faculty were emailed the demographic survey and given 30 days to respond. Follow-up emails were sent two weeks into the data collection process to remind faculty of the deadline in order to maximize response. After 30 days, the survey closed and the data were uploaded to MS Excel for analysis. All responses were anonymous unless the interviewee waived their confidentiality. All interviews and survey data were stored in encrypted format. This methodology was submitted to The University of Texas's Institutional Review Board (IRB) and approved on October 2011 and October 2012.

Participants

The participant selection process entailed two sample selection methodologies. A stratified sampling method followed by a snowball sampling process was used to reach the goal of interviewing 16 to 21 faculty. The initial stratified sample included 23 public university faculty who were active in the governance structure of their institution or were past faculty senate officers. The sample was selected based on a review of public university governance websites. Selected faculty members were emailed a description of

the study and the consent form and asked if they would be available to be interviewed (see Appendices B, C, and D for the email invitation, description of the study, and consent form). Faculty who did not respond were sent one follow-up email. If no response was received, they were dropped from the sample. The stratified sample identified eight faculty members who agreed to be interviewed with eight declining, and seven not returning the first or second invitation.

Next, a snowball sampling methodology was used. Snowball sampling is an open-ended socio-metric method that allows the researcher to build the sample of interviewees, present the list to a preselected group, and expand the list based on extended associations (Kadushin, 1968). The method allowed the sample to build based on the context and criteria specific to the study.

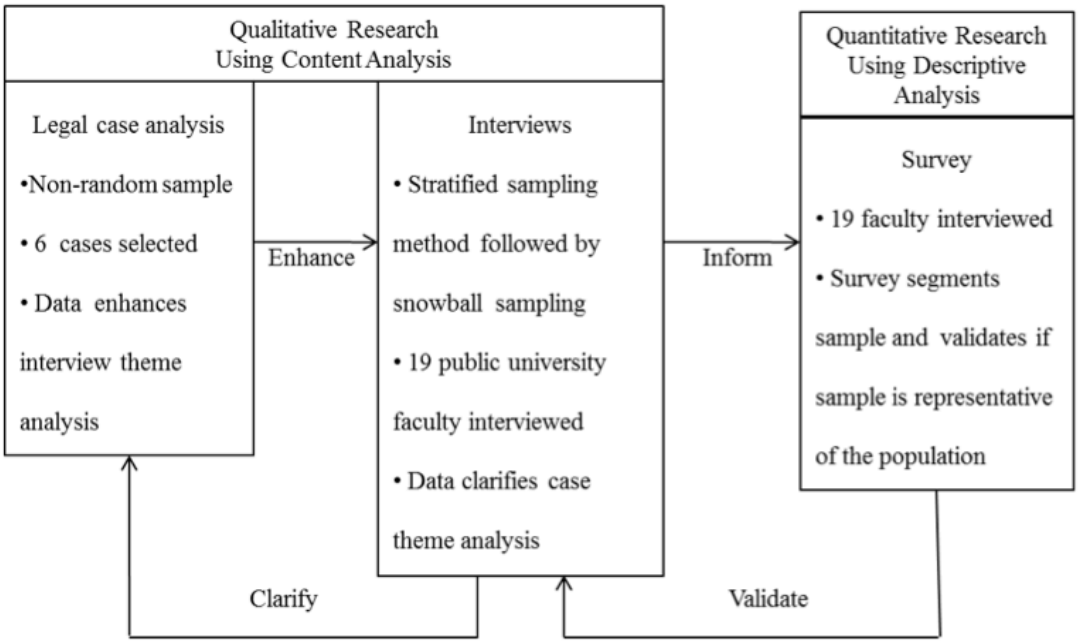
To achieve the goal of interviewing 16 to 21 faculty, the participants in the stratified sample who declined to be interviewed were contacted immediately and asked to provide recommendations of faculty at public universities who might be willing to participate in the study. In addition, faculty who agreed to be interviewed were asked to provide recommendations during the follow-up survey. This methodology yielded 26 additional potential participants of which 11 agreed to be interviewed, 11 did not return the request, and four declined. Faculty who did not return the request were not contacted again and dropped from the sample. The total number of faculty interviewed and surveyed was 19. It took six months to complete the interviews.

Research Design

As Onwuegbuzie and Leech inferred, conducting a mixed methods study "involves collecting, analyzing, and interpreting qualitative and quantitative data in a single study or in a series of studies that investigate the same underlying phenomenon" (September 2006, p. 474). A mixed methods design was selected because it provides the researcher with the ability to approach a problem in a more holistic manner. By validating and linking qualitative and quantitative data, the ability of the researcher to utilize results from one method to inform the results of another improves (Onwuegbuzie & Leech, December 2004) at the micro and macro levels of the study and allows the data set to be probed further to understand its meaning.

The mixed methodology was primarily a qualitative (QUAL) study and utilized a quantitative (QUAN) study as illustrated in Figure 3.1. As characterized by Neuman and Benz (1998), the design was an "interactive continuum" where quantitative data analysis validated the qualitative testing process to significantly enhance overall study results. The interactive design allowed what Onwuegbuzie and Leech (September 2006) called complementarity and expansion of the research. With this design, researchers are able to elaborate and inform results from one method with results from the other method as well as "expand the breadth and range of the investigation by using different methods for different inquiry components" (p. 480). The rationale maximized the interpretation of the data and significantly enhanced the results of the research (Onwuegbuzie & Leech, September 2006) as the "QUAL" studies flushed out the major themes and the "QUAN"

study provided data to define the sample demographics and determine if the sample was representative of the overall sample population.



Note: Design illustrates Onwuegbuzie's and Leech's complementarity and expansion mixed research design.

Figure 3.1. Mixed Method Sequential Research Design

As illustrated, the first phase of the research included two qualitative components. The first component was the non-random selection and analysis of six court cases decided by the district courts, appellate courts, or U.S. Supreme Court from 2000 to present that are specific to intramural and extramural academic free speech. The cases included *Churchill* (2010) for extramural speech, *Schrier* (2006), *Garcetti* (2006), *Hong* (2007), and *Adams* (2010) for faculty speech as employees, and *Grutter* (2003) for institutional academic freedom. The cases were analyzed to identify the logic of the

courts' decisions and to highlight the themes, patterns, and issues discussed in the second part of the qualitative phase, the faculty interviews.

The second component of the qualitative study was one-on-one interviews of 19 public university faculty. The non-random sample consisted of a stratified sample of 23 faculty at public universities who have participated in the governance structure of their institution and were experienced in the area of academic free speech rights. The faculty were selected from public university governance websites and were sent an email with information about the study and a consent form requesting their participation in the study. As some faculty declined to be interviewed, a "snowball" method of sampling was then implemented. Faculty were asking to recommend additional faculty to be interviewed. The "snowball" method continued until the goal of interviewing19 faculty from public U.S. universities was achieved.

The interview format consisted of a general background statement to introduce the past and current issues facing academic freedom and to focus the interviewee on the study. The open-ended format of the interview questions allowed the researcher to probe and ask follow-up questions with the intent of identifying prevalent themes and arguments. The interview questions included the following:

1. How have federal, state, and local events affected academic freedom at your institution since 2000?
2. Is academic freedom a right or a privilege at your institution? What criteria does your institution use to evaluate faculty academic freedom when their

speech as a public employee and private citizen converge and become an issue?

3. In what ways do the faculty governance structures at your institution respond when challenges to faculty intramural and extramural speech occur?
4. What effect does institutional academic freedom have on the faculty's role in the governance structure at your university?
5. How have faculty at your institution altered their intramural and extramural speech since 2000?

The reactions of the interviewees and the environmental issues were noted in order to identify uncontrolled interferences and interviewer bias (Miles & Huberman, 1994).

The second phase, the quantitative analysis, of the study was a follow-up survey of the faculty interviewed. The survey had seven multiple-choice questions to demographic data including region of country, age group, gender, ethnicity, appointment track and type, whether they have participated their institution's faculty governance structure since 2000, and whether they have published on the topic of academic freedom. Respondent's confidentiality was protected at all times.

Analysis of Data

The qualitative analysis of archival information utilizes a content analysis approach. Krippendorff (2004) defined content analysis as "a research technique for making replicable and valid inferences from texts to the contexts of their use" (p.18) and, therefore, inferred that every "content analysis must have a context within which texts are examined" (p. 24). Limiting the context allows the research to remain focused

on the phenomenon studied and reduce the diversity of the interpretations. Defining the context as academic intramural and extramural free speech since 2000 focused the data collection.

Full transcripts of the court case opinions and amicus briefs from professional academic organizations, were retrieved, dated, and filed in order to increase the descriptive validity of the data collection phase. First-level descriptive and interpretive codes (Miles & Huberman, 1994) such as case jurisdiction (federal, district), type (faculty speech as employee, intramural and extramural speech, intuitional academic freedom), decision (plaintiff, defendant, appealed), and consequence (termination, hire, rehire, tenure, loss of tenure) were used to code, reduce, and categorize the data for analysis. As codes became obsolete, they were removed or combined with other codes. As codes emerged, they were added or a second-level coding schema developed in order to allow for further data reduction and analysis. The data was entered into a qualitative data package (NVivo) for further review, reduction, clustering, counting, patterning, matching, and theme identification.

The faculty interviews provided information on the changing landscape of academic freedom on U.S. university campuses. The interview questions and process were piloted with a public university faculty member to validate the flow and clarity of the questions, to determine the amount of time required for each interview, to resolve technical issues, and to deal with any researcher bias. Feedback from the pilot was used to modify and improve the process for the one-on-one interviews and reported in the data analysis.

The 19 interviews were digitally recorded and archived for future reference. The archive provides descriptive validity as the actual one-on-one interviews become a permanent unchanged record of the study. The recordings were sent to a bonded transcription services and transcribed into Microsoft Word for final review, correction, and storage. Field notes taken at the time of the interviews were incorporated into the transcript review and correction process and loaded into a qualitative statistical package for content analysis and coding. Themes and codes derived from the logic of the court case and interview analysis provide focus to the study on the macro-level issues of public university academic freedom in the U.S.

The research then proceeded to the quantitative phase of the study in which a survey was used to collect demographic data in order to identify the characteristics of the sample. The survey collected demographic data such as region of country broken down by Supreme Court district, appointment track and type, generational age group, gender, ethnicity, whether they had participated in faculty governance at their institution since 2000, whether they had published on academic freedom, and a space for additional comments. Participants had seven days from the date of the interview to respond.

Research findings utilized four validation methods to test data quality; 1) pattern checking, 2) replication, 3) phenomenological validity, and 4) triangulation (Miles & Huberman, 1994). The collection of data from archival documents, interviews, and surveys allowed the multiple independent sources to be used to complement their findings. The mixed methods provided both qualitative and quantitative analysis to be used, which allowed the researcher to corroborate and determine conflicts in the results.

To further test data quality, the researcher effect on the interview process was checked prior to the start and during the interview stage. First, the pilot interview determined not only the validity of the questions but also provided feedback on the researcher's communication style and the effect of the researcher on the study (Miles & Huberman, 1994). Feedback from the pilot was recorded for verification during the interviews and incorporated in the actual interviews. Second, the faculty interviews included an environmental scan of the location, documented any interruptions during the interview, and recorded any reactions to questions, or changes in the setting during the interview. At the start of the interview, the interviewees were provided a list of questions to be asked in order to keep the interview focused. All interviews were digital audio recorded, transcribed in full so that all points of view are included, and coded for patterns and themes. After each interview, the researcher documented any changes from the previous interview that might have affected the data interpretation.

After all interviews were completed, the researcher provided the full transcript of each interview to the participant for validating the outcomes and providing clarifications if needed. This "phenomenological validity" test further identifies any research bias that the researcher had on the interview as well as the interview on the researcher (Miles & Huberman, 1994). The data analysis included a write-up of any observations, responses, changes, and effects realized during the interviews.

Outliers in the data analysis were tested to determine the strength of the study's findings. Validating the patterns and themes identified in the qualitative phase with the survey data collected during the quantitative phase identified exceptions due to data

smoothing and provided a way to strengthen the findings by defining what a finding is not. Understanding outliers protects the study against self-bias and builds a better explanation of the results (Miles & Huberman, 1994).

Finally, findings were replicated from multiple independent data sources throughout the study. First, the information from case logic analysis was pulled from cases that have been decided in the federal, district, or state courts. The logic used by the various courts included a review of the amicus briefs in order to provide a cross case analysis of the rulings. Second, the interviews included faculty from different regions of the U.S., universities, academic departments, and types of appointment to provide diversity in the opinions and patterns identified. Third, the surveys of the faculty interviewed provided a basis for determining if the sample was representative of the study population. The replication methods outlined compliment the triangulation method discussed earlier. By using data from multiple sources as well as multiple analysis methods, the researcher eliminates what Miles and Huberman (1994) call "holistic fallacy," or the mistake of basing findings and results on biased information because outliers were ignored. The validity testing affords the data a level of reliability for future studies.

The analysis used the data extracted and coded from each phase to identify dominant patterns and themes. Using postmodern theory to deconstruct the free speech discourse, the study presents the results and findings in the final chapters of the study.

Chapter Summary

This chapter provided an overview of the analytical approach used, the participants in the study, the data collected, and the techniques used to validate the data. In turn, postmodern theory is discussed to explain the perspective from which the data is to be deconstructed and used to interpret the findings. A mixed research methodology is used throughout the data collection and analysis and includes two qualitative and one quantitative method(s). The data was transcribed, coded, and analyzed to identify dominant and subordinate patterns and themes. The data and findings were validated using triangulation, replication, outlier identification, and statistical analysis methods. These processes were invaluable for the analysis of the data in the next chapter.

Chapter Four: *Grutter v. Bollinger*

Background

In 1996, Plaintiff Barbara Grutter applied to the University of Michigan Law School for admission. Grutter's application was initially placed on the Law School's waitlist but was rejected in June 1997 (*Grutter*, 1998). Grutter, who is White, alleged that she was rejected because of her race and the law school's admissions policy whereby "students from favored racial groups had a significantly greater chance of admission than students with similar credentials from disfavored racial groups" (p. 4). On December 3, 1997, Grutter filed a lawsuit in the United States District Court for the Eastern District of Michigan, Southern Division, alleging "that this policy was not justified by any compelling state interest…to remedy past or social discrimination" (p. 4). The defendants in the case were

> Lee Bollinger, the dean of the law school from 1987 to 1994 and president of the University of Michigan from 1997 to the present; Jeffrey Lehman, the dean of the law school from 1994 to the present; Dennis Shields, the director of admissions at the law school from 1991 to 1998; the [elected] regents of the University of Michigan; and the University of Michigan Law School. (*Grutter*, 2001, p. 5)

Grutter based her lawsuit on two claims.

> First, plaintiff claims that the defendants discriminated against her on the basis of her race thereby violating her rights to equal protection under the Fourteenth Amendment. Second, she claims that defendants violated Title VI of the 1964 Civil Rights Act which prohibits recipients of federal funds from discriminating on the basis of race. (p. 5)

She sought "a declaratory judgment to the effect that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive

damages; an order requiring defendants to admit her to the law school; and attorney fees and costs" (p. 5).

The *Grutter* case is discussed in two parts. First, the opinions and actions of the District Court of Michigan, United States District Court of Appeals for the Sixth Circuit, and U.S. Supreme Court are reviewed and discussed to provide a chronology of the case and the variations in the decisions as the case progressed through the court system. Second, the dominant four themes are identified for analysis. The dominant themes are race-based/conscious admissions, validity of Justice Powell's decision in *Bakke*, racial discrimination (past and present), compelling state interest, and achieving a critical mass. The relationship between these themes as well as the ten sub-themes that were also identified are further analyzed and discussed using the opinions and decisions made by the district court, court of appeals, and Supreme Court.

Court Actions

The *Grutter* case started in the District Court of Michigan and was appealed all the way to the U.S. Supreme Court. While the case focuses on racial diversity, it is significant to this study because it is one of the first post-2000 cases in which the Supreme Court upheld the right of the university to make academic decisions and demonstrated the Courts' continued reluctance to interfere in university business unless a compelling state interest existed. These decisions exhibited not only the Courts' hesitation but also the acceptance by the courts to have academic decisions controlled at a higher level in the university.

District Court of Michigan. On July 15, 1998, the defendants made a motion to reassign the civil rights action filed against them to the judge handling a similar case, *Gratz v. Bollinger*. The motion requested that (1) *Grutter* be reassigned from Judge Freidman to Judge Duggan who was presiding over the *Gratz* case and (2) that Judge Freidman assign *Grutter* as a companion case to *Gratz* (*Grutter*, 1998).

> Defendants argued that the complaints in *Grutter* and *Gratz* are "virtually identical"; that the parties are represented by the same attorneys in both cases; that in the two cases "most of the defendants overlap"; and that reassignment "will promote docket efficiency and conserve judicial resources by avoiding duplication of efforts and the risk of inconsistent rulings." (p. 5)

The motion was sent to Chief Judge Taylor who disqualified herself because her husband was a regent at the University of Michigan (*Grutter*, 1998). Taylor, in turn, "reassigned the motion…for consideration and decision by two former chief justices who remain in service, Judge John Feikens and Judge Abele Cook, Jr." (p. 5).

On August 6, 1998, the two judges filed an advisory opinion addressing the second part of the motion but not the first. The judges did not rule on the reassignment of the case to Judge Duggan. The judges concluded but did not rule that *Grutter* and *Gratz* were companion cases under Michigan Local Rule 83.11 (*Grutter*, 1998). Because the judges' opinion was not accompanied by an order, the court viewed it as an advisory opinion and struck it from the record of the case. Friedman, the presiding judge in the case, also ruled that "Judge Fiekens and Cook had no authority to take action or issue any rulings in this case and [that] their opinion [was therefore nullified]" (p. 5) for two reasons. First, when "Taylor disqualified herself, a federal statute required her to

reassign the case to district judges who are in active service, present in the district, and able and qualified to act" (p. 6). Instead, Taylor designed her own procedure and personally selected and reassigned the case to two former chief judges. After disqualifying herself, she should have "refrained from taking any further action in the case [and as a result] violated both her legal and ethical duty by selecting the judicial officers who were to act in her stead" (p. 6). Because the reassignment violated federal statute and the opinion was not accompanied by an order, the court concluded that Judge Fieken's and Cook's opinion was unlawful, void, and must be stricken from the record of the case (*Grutter*, 1998).

The second part of the motion designating *Grutter* and *Gratz* as companion cases was denied by presiding Judge Freidman. He ruled based on Michigan Local Rule 83.11 which defined a companion case as one in which "(i) substantially similar evidence will be offered at trial, or (ii) the same or related parties are present, and the cases arise out of the same transaction or occurrence" (p. 9). The court decided that plaintiffs *Grutter* and *Gratz* were applicants in two separate university programs, the law school and the undergraduate college respectively, and would therefore have dissimilar evidence offered at trial, that the only connection between the two was Lee Bollinger, President of the University of Michigan, that plaintiffs would be represented by two different lawyers, and that the timing of the motions in each case was different. For these reasons the court struck the opinions of Feikens and Cook and denied the motion to reassign *Grutter* to *Gratz* as companion cases (*Grutter*, 1998).

On August 10, 1999, the defendants appealed the ruling by the United States District Court of Michigan to the Sixth Circuit Court of Appeals to disallow defendant-intervenors in both the *Grutter* and *Gratz* cases. "In each of the cases before the court, a group of students and one or more coalitions [appealed] the denial of their motion to intervene in a lawsuit brought to challenge a race-conscious admissions policy at the University of Michigan" (*Grutter*, 1999, p. 1). In order to intervene, the proposed intervenors had to establish,

> (1) that the motion to intervene [was] timely (2) that they [had] a substantial legal interest in the subject matter of the case; (3) that their ability to protect that interest might be impaired in the absence of intervention; and (4) that the parties already before the court might not adequately represent their interest. (p. 4)

The proposed intervenors filed their motion in a timely manner and "argued that their interest in maintaining the use of race as a factor in the University's admissions program is a sufficient substantial legal interest to support intervention as of a right" (p. 4). The court ruled on the second criteria that the intervenors had "enunciated a specific interest in the subject matter of this case, namely their interest in gaining admission to the University" (p. 5).

To satisfy the third criteria of the intervention test, the proposed intervenors had to "show only that impairment of its substantial legal interest is possible if intervention is denied" (p. 5). The court said "that access to the University for African-American and Latino/a students [would] be impaired to some extent and that a substantial decline in

the enrollment of these students [might] well result if the University is precluded from considering race as a factor in admissions" (p. 6). The court noted, that "recent experiences in California and Texas suggested such an outcome [and that] the probability of similar effects in Michigan [was] more than sufficient to meet the minimal requirements of the impairment element" (p. 6).

For the last criteria, the proposed intervenors had to demonstrate that the university would not adequately defend their interests in the outcomes of the case. They argued that there would be inadequate representation of their interests

> because the University is subject to internal and external institutional pressures that may prevent it from articulating some of the defenses of affirmative action that the proposed intervenors intend to present. They also argue that the University is at less risk of harm than the applicants if it loses this case and, thus, that the University may not defend the case as vigorously as will the proposed intervenors. (p. 6)

The appeals court found that the proposed intervenors had satisfied the "intervenors test," that they had articulated that their interests would "be impaired by an adverse determination, and that the existing defendant, the University, may not adequately represent their interests" (p. 6). The appeals court reversed the district court's order denying intervention in *Grutter* and *Gratz* and remanded the cases to permit intervention by the proposed defendant-intervenors (*Grutter*, 1999).

On December 22, 2000, the U. S. District Court for the Eastern District of Michigan heard oral arguments on the defendant's motion for summary judgment and took the motions under advisement (*Grutter*, 2001). The court indicated that

> the trial would focus on the following three issues: (1) the extent to which race [was] a factor in the law school's admissions decisions; (2) whether the law school's consideration of race in making admissions decisions constituted a double standard in which minority and non-minority students are treated differently; and (3) whether the law school could take race into account to "level the playing field" between minority and non-minority applicants. (pp. 5-6)

To evaluate each of these issues, the court reviewed the university's rationale for using race as factor in the admissions processes. A full review of the university's admissions policy was done due to its central role in the case as well as the procedures used to evaluate and select candidates (*Grutter*, 2001). The court highlighted the law school's "desire to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year" (p. 6). The policy also noted that, "no applicant should be admitted unless we expect that applicant to do well enough to graduate" (p. 6). To determine success, the admission evaluators placed emphasis on Law School Admissions Tests (LSAT) and undergraduate grade point averages (UGPA) as well as a number of "soft variables" including "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay," (p. 6) and the difficulty of undergraduate course work. The law school used these evaluation variables to diversify the entering class, to correct past race-based discrimination, and to achieve a "critical mass" of minority students. The admissions director at the time of the appeal defined "critical mass" as a "meaningful number or meaningful representation that is sufficient so that minority students can contribute to classroom dialog without feeling isolated" (p. 10).

To achieve a critical mass, the university's witnesses testified that the law school selected applicants from three separate groups to achieve enrollment diversity of student views, ethnicity, and race. The first applicant group was based solely on LSAT and UPGA scores, the second group was based on soft variable such as their enthusiasm, the quality and difficulty of their undergraduate institution and course selection, and their applicant essay, and the third group which was known as "'special admissions,' for minority students who did not fall within the other two groups" (*Grutter*, 2001, p. 9). Law school admissions officers testified that race had to be used "because a critical mass of minority students could not be enrolled if admissions decisions were based primarily on LSAT scores and UGPAs" (p. 10). No admissions officer testified that they were told to admit a particular number or percentage of minority students to achieve a critical mass but they testified that admission reports indicating race and other soft variables were reviewed daily "to make sure that admissions goals, including those regarding the admission of a critical mass of minority students, [were] being achieved" (p. 11). The law school conceded that race was one of many factors used during the applicant evaluation process and was "not a trump card" (p. 13).

After review of the testimonies, the district court found that "the Law School clearly considers an applicant's race in making admissions decisions" (*Grutter*, 2001, p. 13) with the major contention being the extent and weight race is given during the process. The admissions policy, analytical reports provided by specialists, testimonies by admissions officers, and daily reports used in the achievement of diversity all indicated that race was a compelling factor in the admissions process (*Grutter*, 2001, p. 9). The

court concluded that "that the law school explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students" (p. 18).

The court next considered whether "the Constitution permits the consideration of race in order to achieve racial diversity [or] whether the achievement of racial diversity is a compelling state interest and, if so, whether the law school's admissions policy is narrowly tailored to serve that interest" (p. 18). The court turned to the Supreme Court opinion provided in the *Regents of the University of California v. Bakke* (1978) because it was one of the few landmark cases in which the Supreme Court had addressed the rational for diversity at the time of the trail. "Of the six separate opinions issued by the Supreme Court in *Bakke*, Justice Powell's was the only one that considered whether a state educational institution [had] a compelling interest in admitting a racially diverse class of students" (p. 19). While various Supreme Court Justices joined in sections of Powell's opinion in *Bakke*, a majority did not join the section that considered race a compelling state interest which introduced the question of whether a minority opinion could be used to decide whether the law school's interest in creating a diverse student body was constitutionally protected (*Grutter*, 2001).

After review, the district court concluded that "Justice Powell's discussion of diversity rationale was not among the governing standards to be gleaned from *Bakke*" (p. 21) and that "the Supreme Court in *Bakke* did not recognize the achievement of racial diversity in university admissions as a compelling state interest...because it is not a remedy for past discrimination" (p. 22). The court did not doubt the importance of diversity but determined that the law school's "use of race would only be constitutional

if it were narrowly defined to serve that [compelling state] interest" (p. 23) for five reasons. First, the need to achieve a "critical mass" of underrepresented student was not uniformly defined and therefore, not narrowly tailored to serve a state interest. Second, the university's use of race in the admissions process was not narrowly tailored and had no time limits as indicated by their statement that they would "use them as long as necessary to admit a 'critical mass' of underrepresented students" (p. 23). Third, by using race to ensure the enrollment of a certain minimum percentage of underrepresented minority students, the law school made the admissions policy practically indistinguishable from a quota system. Fourth, no logical basis existed for the law school to give special attention to particular racial groups under the admissions policy (*Grutter*, 2001). Finally, the law school failed "to investigate alternative means for increasing minority enrollment" (p. 25). For these reasons, the Sixth Circuit Court of Appeals held that the law school's attainment of racial diversity was not a state interest and "that the law school's 1992 admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act" (p. 25).

Even though the policy violated Title VI, the court held that individual defendants had qualified immunity from damages. The court's rejection of *Bakke* as a governing standard and the fact that the individual defendants did not participate in the adoption or administration of the admissions policy led the courts to conclude that the individual defendants had no reason to believe that they were violating constitutional law (*Grutter*, 2001). The district court found "that the individual defendants in this case [the regents, president, and administrators] acted reasonably and in good faith in

adopting and administering the policy in question" (p. 26). The court granted the individual defendant's motion for summary judgment on grounds of qualified immunity but, in turn, denied the Board of Regent's motion for protection of liability damages under the Eleventh Amendment immunity clause. The court reasoned that the admissions policy "intentionally endorsed, or acquiesced in, an admissions policy that treats applicants differently because of their race" (pp. 26-27).

The court addressed the third issue of "leveling the playing field" between minority and non-minority applicants. Expert witnesses and concerned parties provided testimony, data, and information

> about the history and current status of racial discrimination in this country; the causes of the "achievement gap" between underrepresented minority and non-minority students; the alleged cultural bias in standardized tests such as the SAT and the LSAT; and the recent experiences of some African American and Mexican American students at high schools, colleges and universities. (p. 27)

After 30 hours of testimony, the court acknowledged the long and tragic history of racial discrimination in the U.S and its lingering effect on school systems. Minority students from these impoverished and ineffective schools have been plagued with negative performance in college and lower UGPA and LSAT scores (*Grutter*, 2001). The court attributed this "to general, societal racial discrimination against these groups" (p. 36) but concluded that (1) that there is

> no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination and (2) that, as a matter of constitutional law, the law school cannot use a race conscious admissions policy and process to correct these problems…to "level the playing field." (p. 36)

The court concluded that the law school may not consider the use of race in their admission process to compensate for past discrimination by others or society because the

"remedying of societal discrimination, either past or present, has not been recognized as a compelling state interest" (p. 39). In conclusion, the court (1) granted plaintiff's request for declaratory relief as the admission policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, (2) granted plaintiff injunctive relief forcing the Law School from using race in admission decisions, and (3) denied the motion for summary judgment except for those individual defendants granted qualified immunity (*Grutter*, 2001).

On April 3, 2001, the only remaining defendant, the university, motioned for a stay of injunctive relief forcing the law school from considering race as a factor in the admissions process. Plaintiff opposed the motion. To prevail, defendants had to demonstrate,

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. (*Grutter v. Bollinger*, 2001, p. 4)

In response, the defendants argued (1) that "there is a reasonable possibility that [their] position [would] ultimately prevail" (p. 4), (2) that the law school would be irreparably harmed unless the injunction was stayed as their "admissions process for the current season [would] be disrupted, (3) that the disruption would prevent them from admitting a racially diverse class" (p. 5), and (4) that the law school's "First Amendment rights to academic freedom and the pursuit of educational goals" (p. 5) were being infringed upon.

The district court stated that the defendants argument of "reasonable possibility" to prevail was not the same as a "strong showing" as required in the test. The court added that the defendants had not, "at a minimum, demonstrate[d] the existence of serious questions going to the merits" (p. 4). The court found that the law school's use of a race-conscious admission process to enroll a "critical mass" of minority students was not a compelling interest and was indistinguishable from a quota system, which was unconstitutional. The court was also not convinced that the law school's admission process would halt or prevent them from admitting a diverse class and injuring the public as their admission process called for examining each application. While the members of the plaintiff's class with pending law school applications have a strong interest in keeping the injunction in place, the public has a "strong public interest in ensuring that public institutions comply with the Constitution" (p. 7). For these reasons, the court denied the defendant's motion for a stay of injunction.

District Court of Appeals for the Sixth Circuit. On April 5, 2001, the defendants appealed the district court's decision to the District Court of Appeals for the Sixth Circuit. The court determined that the injunction would cause "irreparable damage" to the law school because the development of new admissions policies would take time and delay the admissions process (*Grutter v. Bollinger*, 2001). The delay could cause some students to accept admission at other institutions "thus, diminishing the University's ability to compete with other selective law schools for highly qualified applicants" (p. 3) and creating harm that could not be undone. For these reasons, the

appellate court reversed the district court's decision and granted the defendant's motion for a stay of injunction pending appeal.

In December 2001, the defendants appealed the district court's decision to the United States District Court of Appeals for the Sixth Circuit. The district court had held

> (1) it was not bound by Justice Powell's conclusion in *Bakke*, and (2) achieving a diverse student body cannot be a compelling state interest because the Supreme Court has suggested that the only such interest is remedying specific instances of discrimination. (*Grutter*, 2001/2002, p. 5)

The court of appeals reviewed "*de novo* the district court's finding that the law school's efforts to achieve a diverse student body through the consideration of race and ethnic origin is unconstitutional and violates Title VI of the Civil Rights Act of 1964" (p. 5). The court stated that, "to survive constitutional review, the Law school's consideration of race must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest" (p. 5). The defendants contended that their interest in enrolling a "diverse student body [was] compelling under *Regents of the University of California v. Bakke* and that [their] admissions policy [was] narrowly tailored to serve that interest" (p. 3). The court began with a review of the fragmented opinions held by Justices Powell and Brennan in *Bakke* to determine the case's relevance in the current moment.

In *Bakke*, Justice Powell's opinion (which four other justices joined) found that the University of California at Davis (UC Davis)

> could constitutionally justify its consideration of race as an effort to remedy the effects of societal discrimination [and that] the attainment of a diverse student body…clearly is a constitutionally permissible goal for an institution of higher education. (p. 5)

Further support for Powell's opinion was found in a footnote in Brennan's opinion, which referenced the Harvard Plan, a race-conscious admissions practice, as "constitutional…so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination" (p. 8). The Harvard plan considered "the race and ethnicity of applicants [as a plus], but…not the exclusive components of academic diversity, [and] treated each applicant as an individual in the admissions process" (p. 9) to achieve a diverse student body. As the Harvard plan did not segregate admissions or enforce quotas to accomplish diversity, the *Bakke* court recognized it as constitutional and held that it was narrowly tailored not to offend the Equal Protection Clause. In turn, the court of appeals rejected the district court's first conclusion and held that it was "bound by Justice Powell's opinion because *Bakke* remains the law until the Supreme Court instructs otherwise" (p. 5).

Next, the court of appeals considered the district court's second conclusion and reviewed the five factors that the district court used to determine that the law school's use of race was not narrowly tailored to serve a compelling interest. The factors reviewed were that

> (1) the law school did not define "critical mass" with sufficient clarity; (2) the apparent lack of a time limit on the law school's consideration of race and ethnicity; (3) the admissions policy was "practically indistinguishable" from a quota system; (4) the law school did not have a logical basis for considering the race and ethnicity of African-Americans, Native Americans and Puerto Ricans; (5) the law school did not "investigate alternative means for increasing minority enrollment." (p. 12)

The majority concluded that the law school's use of the term "critical mass" did not imply a quota system and that its "pursuit of a 'critical mass' of under-represented

minority students [tracked] the Harvard plan's pursuit of a class with 'meaningful numbers' of minority students" (p. 11). To accomplish a critical mass, the law school used race as one of many factors in their admissions evaluation process, which did not segregate applicants to different criteria. In developing the process, the court found that record showed that the law school had considered alternative methods for achieving diversity but also recognized the law school's need to make academic decisions to support its mission. The court stated that courts "are ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration or which alternatives will allow an institution such as the law school to assemble both a highly qualified and richly diverse academic class" (p. 14). The court deferred judgment on the issues of determining what constitutes a "critical mass" or "meaning numbers" of underrepresented minorities and the amount of time required to maintain their race-conscious admissions process to the law school. In doing so, the Sixth Circuit Court of Appeals "reversed the judgment of the district court and vacated its injunction prohibiting the law school from considering race and ethnicity in its admissions decisions" (p. 15). The majority opinion was enjoined by four chief justices.

Circuit Judge Boggs wrote the dissenting opinion rejecting the majority's acceptance of the law school's admission practices as "a straightforward instance of racial discrimination by a state institution, [which] in the highly charged context of discrimination in educational decisions in favor of 'underrepresented minorities'…would not pass even the slightest scrutiny" (p. 28). Boggs stated (1) that the splintered decision by the Supreme Court in *Bakke* was not a holding decision, (2)

that "the majorities reading of *Bakke* was erroneous" (p. 30) as Powell's concurring opinion on race-conscious admission to promote diversity was not held by a majority of the *Bakke* court, and (3) that, "even if student diversity were a compelling state interest, [Justice Powell's] and the Law School's admissions scheme was not narrowly tailored to serve that interest" (p. 30).

Boggs discussed the majority's use of *Marks* (1977) to discern the majority's decision to apply the holding of the fractured *Bakke* court. In *Marks*, the Court stated that,

> when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. (p. 32)

Boggs asserted that the majority read *Marks* "broadly, to provide a basis for discerning the holding of the Court in circumstances where a majority of the Justices agree on an outcome but not on a rationale for the outcome" (p. 32). Applying this to the opinions in *Bakke*, the *Grutter* majority contended that Powell's opinion was the holding of the Supreme Court, because he concurred in the judgment of the Court on the narrowest grounds, striking down UC Davis's admission policy for the use of quotas but adding, in a concurring opinion, that "race could be taken into account in admissions decisions in certain circumstances, namely to promote diversity" (p. 32). Boggs argued that (1) the majority decision in *Bakke* to invalidate UC Davis' admissions policy was separate from Powell's concurring opinion justifying race-conscious admissions policies and (2) that, even if Powell's concurring opinion was considered a subset of the holding, it would not pass the strict scrutiny test of narrow tailoring. Boggs asserted that instead of Powell's

opinion, the majority should have used Justice Brennan's opinion which narrowed the use of race in the admission process "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination" (p. 35). Boggs' purpose was to demonstrate that the conflicting opinions of concurring Justices could not be used as the holding decision of the Court under *Marks* and that the majority could not apply Powell's opinion "to divine a clear holding from a decidedly unclear decision" (p. 35). Justice Brennan acknowledged this issue in his concurrence when he wrote that "the difficulty of the issue presented [in *Bakke*] and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court" (p. 36). Since *Bakke*, Boggs pointed to two cases, in *Fullilove* (1980) and *Adarand* (1995), in which the courts have "refused to adopt the 'formulas of analysis' set out in *Bakke"* (p. 36). Other cases cited were *Metro Broadcasting* (1990), which called "into question the permissibility of using race for diversity purposes" (p. 38) and *Croson* (1989), which stated that, "race should only be used for remedial settings" (p. 38). Boggs dissented due to the majority's refusal to use *Bakke* and the law school's use of Powell's concurring opinion for a race-conscious admissions practice as the basis for a decision.

Finally, Boggs asserted that the admission practice of the law school was not narrowly tailored to endure strict scrutiny under the Fourteenth Amendment and serve a state interest. He argued that

> the majority…applies extremely subtle reasoning to come to the conclusion that *Bakke* should…be read to hold that the use of race, no matter how extensive, is

> constitutional so long as it does not specify a number of seats to be reserved for minorities and so long as it arguably tracks the Harvard plan. (p. 31)

Boggs contended that the law school's admission practice of "achieving a critical mass did not meet the constitutional requirements of narrow tailoring" (p. 39). He stated that the law school's "efforts to achieve a critical mass [were] functionally indistinguishable from a numerical quota" (p. 39) even though it did not "articulate a precise numerical target for admitted minorities" (p. 39). While the law school could have used other factors for achieving diversity as Powell discussed in *Bakke*, the lack of how the law school defined and favored specific groups left Boggs to believe that ultimately the decision was based on "who is, and is not, an African-American, Hispanic, or Native American" (p. 41) to remedy past discrimination.

To satisfy the strict scrutiny test, a compelling state interest for achieving a diverse student body at the law school must exist and the employment of only those means narrowly tailored to that purpose must be used (*Grutter*, 2001/2002). Boggs argued that the law school's admission practice "to assemble both a *highly* qualified and richly diverse academic class" (p. 45) operated on two-tracks with race acting, "as a 'tip'…that overbalances a…closely divided or nearly evenly balanced choice" (p. 46). While the majority argued that there were no criteria in *Bakke* stating how large racial preference should be, Boggs contended that race was the only factor in the law school's admission decisions and that the law school's use of race raised minority applicants' "chance of admission from zero to 100% in many cases" (p. 46). He added that the lack of evidence that other soft factors had any effect on past admission decisions indicated that the law school had a goal of achieving a "critical mass" or "target" of minority

student enrollments. With this, Boggs stated, "that the Law school's admissions scheme was functionally…indistinguishable from a quota system [and that], at the very least, the Law school's admission plan seems far from employing the mere 'plus' or 'tip' that the majority characterizes its racial preference to be" (p. 48). Boggs dissented from the majority because the Michigan plan sought "racial numbers for the sake of the comfort that those abstract numbers may bring…at the expense of the real rights of real people to fair consideration" (p. 54) and was therefore unconstitutional. Boggs' dissent was joined by three of the other circuit judges.

The Court of Appeals for the Sixth Circuit reversed and vacated the injunction issued by the district court "in which the applicant argued that the law school engaged in admission practices that violated the Equal Protection Clause and Title VII" (p. 1).

U.S. Supreme Court. In April of 2003, the Supreme Court granted *certiorari* to review the case. Justice O'Connor delivered the majority opinion of the court and Justice Rehnquist filed a dissenting opinion, which was joined by Justices Scalia, Kennedy, and Thomas (*Grutter v. Bollinger*, 2003). Justice O'Connor provided an overview of the law school's admission practice, and summarized testimonies of the witnesses, opinions of the judges, and the holdings as the case has progressed through the Michigan District Court and Court of Appeals. The Supreme Court

> granted *certiorari* to resolve the disagreement among the courts of appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities. (pp. 19-20)

To answer this question, Justice O'Connor's opinion began by discussing the splintered decisions in *Bakke,* which was the last time the Supreme Court addressed equal protection and race-conscious admissions policies in public higher education (*Grutter*, 2003). In *Bakke*, O'Connor stated that Powell "approved the university's use of race to further only one interest: the attainment of a diverse student body" (p. 20). He added that Powell

> grounded his analysis in the academic freedom that long has been viewed as a special concern of the First Amendment [and] emphasized that nothing less than the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples. (p. 20)

He believed that race was one factor that universities could use to achieve this diversity and serve a compelling state interest. O'Connor endorsed "Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions" (p. 21).

Second, O'Connor addressed the Equal Protection Clause of the Fourteenth Amendment as it applied to the protection of people, not groups. O'Connor stated that race as a group "should be subject to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" (p. 22). Race-conscious admission policies must be strictly scrutinized by the courts to ensure they are narrowly tailored to serve a compelling governmental interest (*Grutter*, 2003).

Third, Justice O'Connor discussed the law school's admission policy in the context of higher education's interest in having a diverse student body. Deferring to the law school's mission and educational judgment, O'Connor stated that their practice "is in keeping with [the Court's] tradition of giving a degree of deference to a university's

academic decisions, within constitutionally prescribed limits" (p. 22). She acknowledged the Court's past recognition of public education as serving an important purpose and occupying a special niche in our Constitutional tradition, cases grounded in the First Amendment providing universities with educational autonomy, and the expansive freedoms of speech and thought associated with the university environment, which includes the selection of its student body that can provide a robust exchange of ideas (*Grutter*, 2003). On this point, the Court concluded that the law school had a compelling interest in a diverse student body as it was "the heart of the law school's proper institutional mission, and that 'good faith' on the part of a university [was] presumed absent a showing to the contrary" (p. 22).

Fourth, the Court discussed the law school's practice of enrolling a "critical mass" of minority students to "achieve the educational benefits that diversity is designed to produce" (p. 23). O'Connor acknowledged that the district court emphasized the law school's "admissions policy [promoted] 'cross-racial understanding,' [helped] to break down racial stereotypes, and [enabled] students to better understand persons of different races" (p. 23). She recognized the need of business and government to employ people with "the skills needed in today's increasingly global marketplace [that] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints" (p. 23). O'Connor stated that the law school had "determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities [was] necessary to further its compelling interest in securing the educational benefits of a diverse student

body" (p. 24). She held that the law school had "a compelling state interest in attaining a diverse student body" (p. 22).

Finally, O'Connor discussed the "narrow tailoring" of the admission policy required to "serve the state interest" and survive "strict scrutiny" by the courts. O'Connor wrote that the compelling state interest must ensure that "the means chosen 'fit'…the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype" (*Grutter v. Bollinger*, 2003, p. 24). To be narrowly tailored, the law school's "admission program must be flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and place them on the same footing for consideration, although not necessarily according them the same weight" (p. 24) without "unduly burden[ing] individuals who are not members of the favored racial and ethnic groups" (p. 27). The law school's program must also have considered alternatives and be limited in length of time that it is to be used. O'Connor determined that the admission practice of the law school considered many factors other than race, that they did "not unduly harm nonminority applicants," (p. 27) and that the Court took the law school at its word that it would "terminate [their] race-conscious admissions program as soon as practicable" (p. 28).

In conclusion, the majority held that "the Equal Protection Clause does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" (p. 28) and affirmed the judgment of the court of appeals. O'Connor was

joined by Stevens, Souter, Breyer, Ginsburg (in part), and Thomas (in part). Ginsburg, joined by Breyer, wrote a concurring opinion "observing that race-conscious programs must have a logical end point [even though many minorities still cannot] meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions" (p. 29).

Justice Rehnquist wrote the dissenting opinion for the Court. He agreed that "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest [but disagreed that] the University of Michigan Law School's…means [were] narrowly tailored to the interest it assert[ed]" (*Grutter*, 2003, p. 30). He argued that the law school never provided reasons "explaining why significantly more individuals from one underrepresented minority group [were] needed in order to achieve 'critical mass' or further student body diversity" (p. 31). He contested that the law school's practice of achieving a "critical mass" based on *each* underrepresented minority group's statistical representation in the applicant pool was "a naked effort to achieve racial balancing" (p. 30). Under previous Supreme Courts, these practices would not have passed "strict scrutiny" and would have been "call[ed] patently unconstitutional" (p. 33). Justice Kennedy joined in full with the Rehnquist dissent and added a discussion of the majority's application of "strict scrutiny" to approve "how the law school's admission policy is implemented" (p. 34).

Justice Kennedy contended that the law school had "the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an

unconstitutional way" (p. 34). To accomplish this, the school had "either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment" (p. 34). Kennedy concluded that the law school did neither (*Grutter*, 2003). He argued that,

> the consultation of daily reports during the last stages of the admissions process suggests there was no further attempt at individual review save for race itself [and that the] admissions officers could [have used] the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. (p. 34)

To be constitutional, the individual must be safeguarded throughout the admissions process where "race does not become a predominant factor in the admissions decision making" (p. 35). Justice Kennedy found regrettable the Court's important holding "allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities [through the] suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place" (p. 36) and, therefore, dissented.

Justice Thomas, joined by Scalia, provided an opinion in which they concurred in part and dissented in part. They concurred with the Court's decision confirming "that further use of race in admissions remains unlawful [and] the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years" (p. 38). They dissented from the remainder of "the Court's opinion and the judgment…because…the Law School's current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months" (p. 38).

Analysis

The *Grutter* case began in the district courts of Michigan in August 1998 and ended in the U.S. Supreme Court in June 2003 (59 months). The analysis of the court opinions as the case progressed through district court, court of appeals, and Supreme Court identified 14 themes with 159, 267, and 250 coded references respectively for a total of 676 coded references. The 14 themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 4.1. The themes are sorted by the *Totals by Theme* column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions.

Table 4.1

Coded References by Theme and Court

Themes	District Court	Court of Appeals	Supreme Court	Totals by Theme
Diversity through race-conscious admissions	42	72	64	178
Validity of Powell's opinion in *Bakke*	16	54	29	99
Racial discrimination (past and present)	31	17	36	84
Compelling state interest	14	23	28	65
Achieving a critical mass	4	20	21	45
Race-neutral admissions	0	28	17	45
Use of enrollment quotas	5	20	7	32
Narrow tailoring/strict scrutiny	6	9	15	30
Equal Protection Clause (14th Amendment)	4	12	12	28
Hard admissions variables	11	5	5	21
Academic freedom	4	2	9	15
Affirmative Action	10	2	2	14
Summary judgment motion	11	0	0	11
Soft admissions variables	1	3	5	9
Totals by Court	159	267	250	676

To validate the ranking, the researcher developed two queries to determine the most frequently used words in all the opinions. The usage of each word was reviewed

and assigned to each of the above themes. The first query scanned word frequency across all the *Grutter* court opinions to identify the 50 most frequently used, three or more letter keywords. The contextual usage of each keyword in each court opinion was analyzed to determine whether the individual keyword was significant or required one or more adjacent words from the opinions to improve meaning. Themes with no applicable keywords utilized the theme title or words within the title and were added to the list of keywords or phrases. The keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 32 remained relevant to the analysis and 18 were dropped due to irrelevance, vagueness, or lack of specificity. Twenty-three of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. Twelve phrases consisting of keywords and adjacent words in the opinions or theme titles were identified. Each keyword and phrase was aligned with one of the 16 themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion. Each occurrence in each opinion was reviewed to eliminate redundancy and duplicity of reference counts. Where redundancy was found, the query was refined and rerun. The query results were tabulated by court opinion and sorted in descending order by total number of references for each theme. The results are provided in the table 4.2 below.

Table 4.2

Keywords and Phrases Totaled Theme and Court Cases and Sorted by Theme

Themes	Key Words	District Court	Court of Appeals	Supreme Court	Totals
Diversity through race-conscious admissions	Divers*, minorit*, underrepresented, admission policy, process, program, decisions, student body, race conscious, race based	461	731	354	1546
Validity of Powell's opinion in *Bakke*	*Bakke*, Harvard, Powell	90	449	133	672
Racial discrimination (past and present)	Discriminat*	57	76	104	237
Compelling state interest	Compelling	31	95	64	190
Narrow tailoring/strict scrutiny	Tailor*, strict scrutiny	26	84	69	179
Summary judgment	Summary judgment	31	74	56	161
Affirmative action	Affirmative action	36	51	12	99
Achieving a critical mass	Critical mass	36	51	12	99
Use of enrollment quotas	Quota*	17	53	27	97
Hard admissions variables	LSAT, UGPA, SAT, GPA	62	25	4	91
Race neutral admissions	Neutral, blind	17	45	22	84
Equal Protection Clause (14th Amendment)	Equal protection clause, Fourteenth Amendment	23	30	26	79
Academic freedom	First Amendment, academic freedom	6	9	14	29
Soft admissions variables	Soft	1	10	1	12

The theme rankings in Tables 4.1 and 4.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in the tables, the four most prevalent themes were; 1) diversity through race-conscious admissions, 2) validity of Powell opinion in *Bakke*, 3) racial discrimination (past and present) and, 4) compelling state interest. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 4.3. The highest correlations were between the diversity through race-conscious admissions

and racial discrimination (past and present) themes (0.94544) and the validity of Powell opinion in *Bakke* and compelling state interest themes (0.91395).

Table 4.3

Pearson Correlation Coefficients for the Prevalent Themes

Theme	Diversity through race-conscious admission	Validity of Powell's opinion in Bakke	Racial discrimination (past and present)	Compelling state interest
Diversity through race-conscious admission	1.00000	0.90547	0.94544	0.88347
Validity of Powell's opinion in *Bakke*	0.90547	1.00000	0.86685	0.91395
Racial discrimination (past and present)	0.94544	0.86685	1.00000	0.85961
Compelling state interest	0.88347	0.91395	0.85961	1.00000

The prevalent themes are discussed based on the order provided in Table 4.4. A line graph of Table 4.4's coded references by opinion and brief is provided in Figure 4.1.

Table 4.4

Number of Coded References in Prevalent Themes by Court Opinion

Themes	District Court	Court of Appeals	Supreme Court	Totals by Theme
Diversity through race-conscious admissions	42	72	64	178
Validity of Powel opinion in *Bakke*	16	54	29	99
Racial discrimination (past and present)	31	17	36	84
Compelling state interest	14	23	28	65

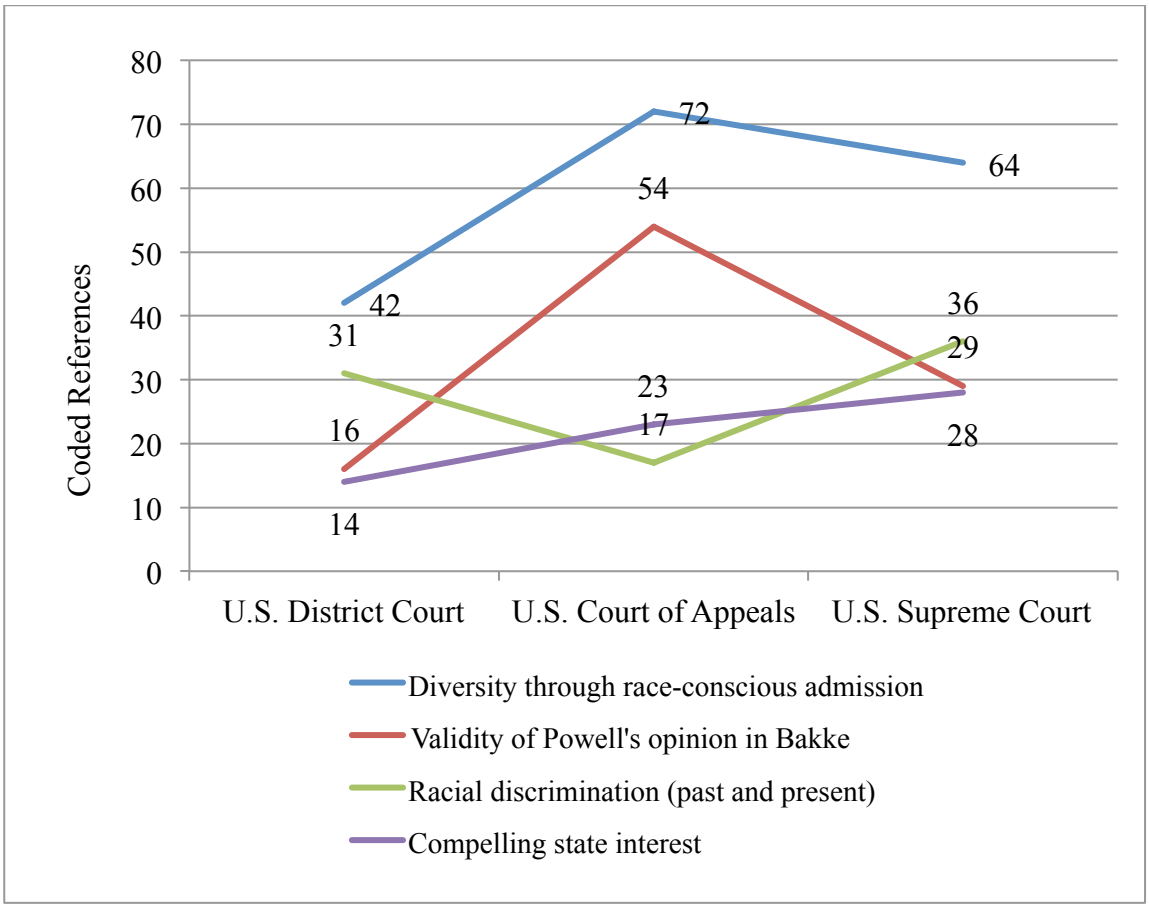


Figure 4.1. Four Most Prevalent Themes Based on Coded References

Diversity through race-conscious admissions. The dominant theme was diversity through race-conscious admissions. The theme exemplifies the conscious use of race by the law school in their admissions policies and their justification for its use based on Justice Powell's splintered Supreme Court opinion in *Bakke*. The number of coded references was the highest of all themes which is to be expected because the "major bone of contention in this case has been the extent to which race is considered in the admissions process" (*Grutter*, 2001, p. 16). One hundred and seventy-eight references were coded from the opinions with 42, 72, and 64 in the district court, court

of appeals, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the validity of *Bakke* opinion, racial discrimination (past and present), race-neutral admission, and achieving critical mass themes 41, 27, 20, and 19 times respectively. Table 4.5 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the diversity through race-conscious admissions theme.

Table 4.5

Matrix Coding of the Four Prevalent Themes That Overlap the Diversity Through Race-Conscious Admissions

Themes	District Court	Court of Appeals	Supreme Court	Totals by Theme
Validity of Powell's opinion in *Bakke*	7	22	12	41
Racial discrimination (past and present)	3	8	16	27
Race neutral admission	0	13	7	20
Achieving a critical mass	3	5	11	19

District court. The district court reviewed the law school's reasons for including race as an admission factor as "the law school clearly considered an applicant's race in making admissions decisions" (*Grutter*, 2001, p. 15) with preference given to African American, Native American, Mexican American, and Puerto Rican applicants (*Grutter*, 2001). The law school's statistician testified on the use of race to achieve diversity and stated that that "the number of underrepresented minority admittees would drop 'sharply and dramatically' if race were not considered in the admissions process" (p. 17). The court found "significant [the fact] that the dean and the admissions director monitor[ed]

the law school's 'daily admissions reports,' which classif[ied] applicants by race" (p. 18) and that statistics showed that "10% to 17% of each entering class [were] of African American, Native American, and Hispanic students" (p. 18). The court found that the "admissions policy [was] explicit about the extent of this commitment [as] race is considered at least to the extent necessary to enroll a 'critical mass' of students from these groups" (p. 24). The court concluded, "that the law school accords the race of the applicants a great deal of weight" (p. 17).

The district court continued with a review of Powell's opinion in *Bakke* concerning the use of race as a factor in admissions decisions at the University of California at Davis and whether the use of race to achieve racial diversity satisfied a state interest. While "racial diversity in the law school population may provide these educational and societal benefits" (p. 23), the court stated "that *Bakke* [did] not stand for the proposition that a university's desire to assemble a racially diverse student body [was] a compelling state interest" (p. 21) and "that the achievement of such diversity [was] not a remedy for [specific instances of] past discrimination" (p. 22). The court concluded that the splintered decisions in *Bakke* did not constitute a majority opinion and ruled that, even though the law school's admission policy was modeled after the Harvard Plan discussed in *Bakke*, it was not narrowly tailored enough to survive strict scrutiny by the courts.

With Powell's opinion invalidated, the court had to determine whether the law school's use of race as an admissions factor was constitutional or not. The district court found that "the Supreme Court [had] held that the effects of general, societal

discrimination cannot constitutionally be remedied by race-conscious decision-making" (p. 36). As such, the court ruled that federal constitutional law does not permit the law school "to 'level the playing field' and may not consider the race of applicants in order to compensate for the effects of discrimination by others or by society generally" (p. 36). The law school's race-based/conscious admission policy was, therefore, unconstitutional.

Court of appeals. Judge Martin wrote the majority opinion for the court and discussed the district court's decision. He stated that "Powell's opinion constitute[d] *Bakke*'s holding and provides the governing standard here" (*Grutter*, 2002, p. 7) for utilizing race as one factor in admissions decisions and "that the law school [had] a compelling state interest in achieving a diverse student body" (p. 7). In addition, he added that "this court cannot ignore the distinction between a constitutionally permissible goal– 'achieving an integrated student body' –and a constitutionally permissible use of race to achieve that goal so long as necessitated by the lingering effects of past discrimination" (p. 8). The majority was

> satisfied that the law school's admission policy sets appropriate limits on the competitive consideration of race and ethnicity [and noted] the Law School['s intent] to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a "critical mass" of under-represented minority students through race-neutral means. (p. 14)

Martin reversed the district court's ruling and held that the Michigan's race based admissions policy was constitutional.

Judge Boggs' dissenting opinion argued that the law school's use of race would not survive strict scrutiny by the courts as the "rationale proffered…was not tied to remedying past discrimination" (p. 38) but rather to increase academic diversity. He used *Grutter*'s admission rejection to ponder the fairness of the law school's race-based admissions policy in the following hypothetical.

> As I put it to the counsel for the Law School in oral argument, if Heman Sweatt, the plaintiff in the famous case of *Sweatt v. Painter* (1950), had been able to ask the Dean of the University of Texas Law School, "Dean, would you let me in if I were [W]hite?" [T]he dean, if he were honest, would surely have said "Yes." I then asked counsel, "If Barbara Grutter walked in to whoever the current Dean of the Law School is and said, 'Dean, would you let me in if I were [B]lack?' wouldn't he have to honestly say either 'Yes' or 'pretty darn almost certainly'"? Counsel agreed, but responded that "a [B]lack woman who had otherwise an application that looked like Barbara Grutter, that would be a different person." (p. 29)

He validated his hypothesis during the oral argument when he "asked counsel whether, if [Barbara Grutter] were of a different race, she would have been admitted whether she had come of age in inner-city Detroit or in Grosse Pointe [and] he answered: 'That's probably right.'" (p. 40). Boggs concluded that "it is a long road from Sweatt to Barbara Grutter [but] both ended up outside a door that a government's use of racial considerations denied them a fair chance to enter" (p. 54) and dissented from the majority's legitimation of the Michigan's use of race in their admissions policy.

U.S. Supreme Court. As previous courts had done, Justice O'Connor discussed Powell's opinion as it related to the laws school's concept of admitting a critical mass of students from specific racial groups and the duration of time that a race-conscious admissions policy would need to be in place to be considered narrowly tailored. O'Connor reflected that, since the Supreme Court's splintered decision in *Bakke*, "public

and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies" (*Grutter*, 2003, p. 20). To further a compelling state interest, the policy

> cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks [or] insulate applicants who belong to certain racial or ethnic groups from the competition for admission [but can] consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant. (p. 24)

She found that "the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions" (p. 26) and satisfied all the criteria for narrow tailoring and strict scrutiny.

O'Connor continued with a discussion of the amount of time the program would need to be in effect to remedy past discrimination. She recognized that "race-conscious admissions policies must be limited in time [to satisfy a compelling state interest and] employed no more broadly than the interest demands" (p. 27). To satisfy this requirement, the policies must have "sunset provisions…and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity" (p. 27) to which the law school agreed. She concluded that "the Equal Protection Clause does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body" (p. 28) and affirmed the court of appeal's decision.

Justice Ginsburg disagreed on the law school's use of race to create a critical mass of racially diverse students. Ginsburg stated that the "Court confuse[d] deference to a university's definition of its educational objective with deference to the implementation of this goal [and] refused to be faithful to the settled principle of strict review designed to reflect these concerns" (p. 34). To not be unconstitutional, required the "law school either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment" (p. 35) is enforced throughout the admissions process. Ginsburg concluded that Michigan did neither. She stated that

> [i]t is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny [standard] which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. (p. 36)

Ginsburg approved the right to classify students based on race but dissented in this case as she believed that the law school's practice was not narrowly tailored by time limits to survive a strict scrutiny test.

In his dissenting opinion, Justice Rehnquist rejected the use of race-conscious admissions practices by the law school to achieve a critical mass of minority students. He contended that, "the ostensibly flexible nature of the Law School's admissions program that the Court finds appealing appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups" (p. 33). He inferred that the law school's admissions practice is unconstitutional based on evidence that their "admissions program extend[ed] offers of

admission to members of selected minority groups in proportion to their statistical representation in the applicant pool" (p. 33) which is called racial balancing. In addition, Rehnquist agreed with Ginsburg that the time limits necessary for the policy would not survive strict scrutiny as the majority stated and, therefore, dissented.

Validity of Powell's opinion in *Bakke*. The validity of Powell's opinion in *Bakke* theme focused on the Supreme Court's analysis of the *Bakke* case and specifically whether Powell's tie-breaking, splintered opinion could be generalized to other cases. Specifically, the analysis was guided by Powell's statement "that a state educational institution has a compelling interest in admitting a diverse student body, and that ethnic diversity…is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body" (*Grutter,* 2001, p. 18). Ninety-nine references were coded from the opinions with 16, 54, and 29 in the district court, court of appeals, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the diversity through race-conscious admissions, compelling state interest, race-neutral admission and use of enrollment quotas themes 45, 25, 16, and 14 times respectively. Table 4.6 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the validity of Powell's opinion in *Bakke* theme.

Table 4.6

Matrix Coding of the Four Prevalent Themes That Overlap the Validity of Powell's Opinion in Bakke Theme

Themes	District Court	Court of Appeals	Supreme Court	Totals by Theme
Diversity through race-conscious admission	7	22	12	41
Compelling state interest	8	8	9	25
Race neutral admission	0	11	5	16
Use of enrollment quotas	4	9	1	14

District court. The district court was faced with piecing together the conflicting opinions of Brennan and Powell of the *Bakke* court to determine if *Bakke*'s holding was applicable and still valid. The justices siding with Brennan "did not believe that the diversity rationale was before the Court, as those Justices stated that the 'issue presented' in the case was 'whether government may use race-conscious programs to redress the continuing effects of past discrimination'" (*Grutter*, 2001, p. 20). Powell "cited Justice Frankfurter's statement in *Sweezy v. New Hampshire* [(1957) that] universities must have the freedom to decide which students to admit, as this is relevant to providing an atmosphere which is most conducive to speculation, experiment and creation" (p. 19) and that "a state educational institution may have a compelling interest in admitting a racially diverse class of students" (p. 19). In *Grutter*, the district court determined "that, while the Brennan group and Justice Powell agreed that race may be considered in admissions, …they disagreed entirely as to the reasons why" (p. 20). Judge Freidman stated that

> no Supreme Court decision since *Bakke* has addressed the constitutionality of affirmative action in university admissions, and *Bakke* itself, to borrow a phrase, "is a riddle wrapped in a mystery inside an enigma." Lower courts have tried for years, with little success, to divine the legal principles to be gleaned from *Bakke*, and to understand how, if at all, the teachings of other affirmative action cases may apply to the higher education context. (p. 25)

The district court concluded that

> the Supreme Court in *Bakke* did not recognize the achievement of racial diversity in university admissions as a compelling state interest [and] that under the Supreme Court's post-*Bakke* decisions, the achievement of such diversity is not a compelling state interest because it is not a remedy for past discrimination. (p. 22)

The district court did not deny that racial diversity provided benefits to education and society but determined that racial diversity was not recognized as a remedial interest in *Bakke* (*Grutter*, 2001) and, therefore, not a governing standard.

Court of appeals. The court of appeals reviewed the case from the standpoint of whether the law school's use of race in their admission policy was a compelling interest. The court returned to Brennan's and Powell's opinion in *Bakke* to interpret and resolve the issue. Judge Martin, who wrote the opinion of the court, stated, that "neither party question[ed] the applicability of Justice Powell's opinion regarding the narrowly tailored component of strict scrutiny, and it [was] our view that whether the law school's admission policy pass[ed] constitutional muster turn[ed] on Justice Powell's opinion" (*Grutter*, 2002, p. 10). He added that "*Bakke* remain[ed] the law until the Supreme Court instruct[ed] otherwise, [rejected] the district court's conclusion and [found] that the Law School has a compelling interest in achieving a diverse student body" (p. 6). His holding validated *Bakke*'s conclusions as applied by the District Court.

Judge Boggs, in his dissenting opinion, rebutted the majority's decision that Michigan's interest in "achieving of a critical mass" was not a compelling state interest and was therefore unconstitutional. Boggs stated that

> the majority applies extremely subtle reasoning to come to the conclusion that *Bakke* should…be read to hold that the use of race, no matter how extensive, is constitutional so long as it does not specify a number of seats to be reserved for minorities and so long as it arguably tracks the Harvard plan. (p. 31)

Boggs added that,

> since Justice Powell rejected the past discrimination rationale and Justice Brennan can be read to have implicitly rejected the diversity rationale, there is no continuum to be found in *Bakke*; instead of a broader holding and a narrower holding, what we might have are two different and non-comparable holdings. If such a reading is adopted, the "holding" that the majority of this court has divined from the Supreme Court's *Bakke* decision is a rationale set out by one Justice and rejected by eight. (p. 34)

He concluded that "*Bakke* remains good law" (p. 30) but "that the majority's reading of *Bakke* is erroneous" (p. 30) and that their achievement of a critical mass would not survive strict scrutiny. The majority assumed, "along the lines suggested by…Powell, that the law school act[ed] in good faith in exercising its educational judgment and expertise" (p. 13) and concluded that, "contrary to the dissent's assertion, there [was] nothing to indicate that the law school's admission's policy has 'taken' anything 'from the Barbara Grutters of our society'" (p. 23). The court held "that diversity in a student body is a recognized compelling governmental interest pursuant to Powell's controlling opinion in *Bakke*" (p. 19) and that his opinion in *Bakke* is valid.

U.S. Supreme Court. Justice O'Connor endorsed Powell's view that "student body diversity is a compelling state interest that can justify the use of race in university admissions" (*Grutter*, 2003, p. 15). O'Connor recognized that the "only holding for the Court in *Bakke* was that a State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin" (p. 20). Powell's interest in diversity went beyond race encompassing a far broader array of qualification and classifications of which race and ethnicity were one of a number of elements to be considered (*Grutter*, 2003).

> In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the robust exchange of ideas," a university seeks to achieve a goal that is of paramount importance in the fulfillment of its mission. (p. 22)

As such, the majority endorsed "Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions" (p. 21) "and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary'" (p. 22).

> Joined in full by Rehnquist in his dissenting opinion, Kennedy stated that the
>
> separate opinion by Justice Powell in...*Bakke* is based on the principle that a university admissions program may take account of race as one, non-predominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. (p. 33)

He concluded that, "the opinion by Justice Powell, in my view, states the correct rule for resolving this case [but that the] Court…does not apply strict scrutiny [which] undermines both the test and its controlling precedents" (p. 33). He agreed that race could be used in admissions but disapproved of the Court's suspension of strict scrutiny in this case (*Grutter v. Bollinger*, 2003).

Thomas and Scalia concurred with Kennedy in part and dissented in part. Thomas stated that "Justice Powell's opinion in *Bakke* and the court's decision today rest on the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another" (p. 40). He disagreed with the court's "expansion of permissible use of race for something as trivial…as the assembling of a law school class" (p. 40). He concluded that without judicial review these uses could not be justified. In spite of these arguments, the Supreme Court held that Powell's opinion in *Bakke* was still valid.

Racial discrimination (past and present). The racial discrimination (past and present) theme focused on the past racial discrimination of the nation and federal laws that have prompted universities to implement policies that use race, ethnicity, and socio-cultural factors in their enrollment criteria. Eighty-four references were coded from the opinions with 31, 17, and 36 in the district court, court of appeals, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions, the theme overlapped the diversity through race-conscious admission, validity of Powell's opinion in *Bakke*, compelling state interest, and Equal

Protection Clause (Fourteenth Amendment) themes 27, 9, 7, and 6 times respectively. Table 4.7 provides the results of the query for each opinion. The analysis includes examples from each court opinion showing how these four themes relate to the racial discrimination (past and present) theme.

Table 4.7

Matrix Coding of the Three Prevalent Themes That Overlap the Racial Discrimination (Past and Present) Theme

Themes	District Court	Court of Appeals	Supreme Court	Totals by Theme
Diversity through race-conscious admission	3	8	16	27
Validity of Powell's opinion in *Bakke*	2	3	4	9
Compelling state interest	2	2	3	7
Equal Protection Clause (14th Amendment)	1	4	1	6

District court. The district court heard testimony from students, professors, and statisticians on race discrimination issues at universities. Four minority students provided testimony. Ms. Dowdell, an African American, student stated that,

> as an undergraduate student at the University of Michigan, Ms. Dowdell testified that she feels isolated because African Americans are in the minority. She also testified that she experiences racism on a daily basis, and she gave examples of insensitive remarks by other students and instructors. While Ms. Dowdell is doing well academically, she feels that racism negatively affects her performance because it is discouraging and distracting. (*Grutter*, 2001, p. 27)

Concepcion Escobar, a Mexican American and Native American student at the University of Michigan's Law School, testified on her experiences at a predominately Black high school in Chicago and at Amherst, a predominately White university. She stated that

> she did not often speak in class at Amherst because the student population was predominantly white and she did not want to play the role of representing her race. She also testified about some of the difficulties she and her classmates had in understanding one another, as they came from such completely different backgrounds. (p. 27)

Crystal James, an African American student at UCLA's Law School, stated that she felt

> Isolate[d] and believe[d] that students and teachers expect her to represent the "black viewpoint" when racial issues are discussed. She also has experienced a loss of self-confidence and optimism, and a decline in her academic performance, which she attributes to her racial isolation and to subtle forms of racism on campus. The latter phenomenon has taken the form of students making anti-affirmative action comments, teachers failing to direct classroom discussion of racial issues in a positive manner, and teachers neglecting to call on her in class because, she believes, they assume she would not be able to respond. (p. 27)

Dr. Walter Allen, a professor of Sociology at UCLA, studied the racial climate at four feeder colleges to the Michigan Law School. He testified that the participants in the study

> described the overall racial climate of their campuses as a place where they feel their presence is questioned and belittled. The underrepresented minority focus group participants described various items which contributed to this climate, including insensitive or racist remarks by faculty and students, a feeling of isolation due to the low number of fellow students of the same race, avoidance of racial issues in classroom discussions, the lack of minority role models such as faculty members, exclusion from white study groups, and unequal treatment by campus police. Some of the focus group participants also indicated that the negative racial climate caused them to feel alienated and discouraged and that this harmed their academic performance. (p. 30)

While the testimonies provided background information on past social discrimination, the district court concluded that the law school cannot use race as a factor to level the enrollment playing field (*Grutter*, 2001).

Court of appeals. The court of appeals argued that the rewards current students are receiving from past discrimination should not be ignored. Dissenting Judge Boggs

called the law school's practice "a straightforward instance of racial discrimination by a state institution [that] would not pass even the slightest scrutiny" (*Grutter*, 2002, p. 28). The majority rebutted that it

> is insulting to African Americans, or to any race or ethnicity that has known oppression and discrimination the likes of which slavery embodies, to think that a generation enjoying the end product of a life of affluence has forgotten or cannot relate the enormous personal sacrifice made by their family members and ancestors not all that long ago in order to make the end possible. (p. 22)

Boggs continued that if he

> asked counsel, "If Barbara Grutter walked in to whoever the current Dean of the Law School is and said, 'Dean, would you let me in if I were black?' wouldn't he have to honestly say either 'Yes' or 'pretty darn almost certainly'?" Counsel agreed, but responded that "a black woman who had otherwise an application that looked like Barbara Grutter, that would be a different person." (p. 29)

In the majority opinion, Judge Martin rebutted that,

> the dissent's arguments as to why diversity cannot serve as a compelling state interest constitute nothing more than myopic, baseless conclusions that ignore the daily affairs and interactions of society today which very well may be experienced by all. And the dissent's offer to "stipulate" to the fact that race continues to play a negative role in the lives of minorities is nothing more than a mere expression of words made in an attempt to minimize the force of the many benefits of diversity. (p. 23)

The court of appeals reversed the district court's decision and found the law school's admissions policy constitutional under the Equal Protection Clause of the Fourteenth Amendment (*Grutter*, 2002).

U.S. Supreme Court. The Supreme Court agreed with the lower court's decision. Ginsburg found "that the law school's program fail[ed] strict scrutiny because it is devoid of any reasonably precise time limit on the law school's use of race in admissions" (*Grutter*, 2003, p. 33) but continued that, if

> it [was] appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate…for the civil service system of the State of Michigan to do so. (p. 37)

Dissenting, Thomas responded that

> [t]he Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution. And the same Court that had the courage to order the desegregation of all public schools in the South now fears, on the basis of platitudes rather than principle, to force the Law School to abandon a decidedly imperfect admissions regime that provides the basis for racial discrimination. (p. 46)

> [i]t has been nearly 140 years since Frederick Douglass asked the intellectual ancestors of the Law School to "[d]o nothing with us!" and the Nation adopted the Fourteenth Amendment. Now we must wait another 25 years to see this principle of equality vindicated. I therefore respectfully dissent from the remainder of the Court's opinion and the judgment. (p. 49)

Compelling state interest. The compelling state interest theme focuses on the court's differing opinions concerning a "state institution's desire to assemble a racially diverse student body is a compelling government interest" (*Grutter*, p. 19) and whether a public university has a right to include factors in their admissions process to accomplish this interest. Thirty-two references were coded from the opinions and brief with 14, 18, and 0 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the validity of Powell's opinion in *Bakke*, diversity through race-conscious, admission, Equal Protection clause (Fourteenth Amendment), and racial discrimination (past and present) themes 25, 17, 8, and 7 times respectively. Table 4.8 provides the results of the query for each opinion and brief. The analysis includes

examples from each court opinion and brief showing how these four themes relate to the compelling state interest theme.

Table 4.8

Matrix Coding of the Three Prevalent Themes that Overlap the Compelling State Interest Theme

Themes	U.S. District Court	U.S. Court of Appeals	U.S. Supreme Court	Totals by Theme
Validity of Powell's opinion in *Bakke*	8	8	9	25
Diversity through race-conscious admission	5	5	7	17
Equal protection clause (14th Amendment)	0	3	5	8
Racial discrimination (past and present)	2	3	3	7

District court. The district court's dilemma was to determine "whether the achievement of racial diversity [was] a compelling state interest and, if so, whether the law school's admissions policy [was] narrowly tailored to serve that interest" (*Grutter*, 2001, p. 18). Each party argued the validity of Powell's opinion in *Bakke* of whether attaining "a diverse student body…clearly [was] a constitutionally permissible goal for an institution of higher education" (p. 19). Judge Freidman stated,

> [in] our history, such distinctions generally have been used for improper purposes. Even when used for "benign" purposes, they always have the potential for causing great divisiveness. For these reasons, all racial distinctions are inherently suspect and presumptively invalid. This presumption may be overcome only upon a showing that the distinction in question serves a compelling state interest, and that the use of race is narrowly tailored to the achievement of that interest. (p. 38)

The district court concluded "that Justice Powell's discussion of the diversity rationale is not among the governing standards to be gleaned from *Bakke*" (p. 38) and "that under the Supreme Court's post-*Bakke* decisions, the achievement of such diversity is not a

compelling state interest because it is not a remedy for past discrimination" (p. 22). The district court ruled that the law school's use of race was "unconstitutional and a violation of Title VI of the 1964 Civil Rights Act" (p. 38).

Court of appeals. The court of appeals reviewed *de novo* the district court's ruling to determine if the use of race and ethnic origin was constitutional. "To survive constitutional review, the Law School's consideration of race must 1) serve a compelling state interest and 2) be narrowly tailored to achieve that interest" (*Grutter*, 2001/2002, p. 5). The concurring and dissenting opinions discussed Powell's opinion in *Bakke* to determine whether diversity was a compelling state interest. The *Grutter* dissenting opinion concluded, "that the state's interest in a diverse student body, at least as articulated by the Law School, cannot constitute a compelling state interest sufficient to satisfy strict scrutiny" (p. 30). In turn, the majority recognized,

> that a diverse student body is a compelling interest because it promotes the atmosphere of higher education to which our nation is committed inasmuch as it allows the students to train in an environment embodied with ideas and mores "as diverse as this Nation of many peoples. (p. 21)

The court of appeals reversed the district court's decision that diversity was not a compelling state interest and that the law school's admission policy violated the Equal Protection Clause and Title VII (*Grutter*, 2001/2002).

U.S. Supreme Court. The Supreme Court reviewed the question of whether having a diverse student body was a compelling state interest with Justice O'Connor delivering the majority opinion of the court. O'Connor endorsed Justice Powell's opinion that "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a

single though important element" (*Grutter*, 2003, p. 21). O'Connor added that, "when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied" (pp. 21-22). Rehnquist dissented stating that the law school's "interest in providing educational benefits was accomplished through racial balancing that the Court itself calls 'patently unconstitutional'" (p. 33) and that their admissions policy was not narrowly tailored to survive strict scrutiny. He contended that the law school's

> argument, as facile as it is, can only be understood in one way: Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits [and that it] is the *educational benefits* that are the end, or allegedly compelling state interest, not "diversity." (p. 40)

He furthered his argument with the opinion that "Michigan has no compelling interest in having a law school at all, much less an *elite* one" (p. 41) and that the law school's "interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions 'standards' that, in turn, create the law school's 'need' to discriminate on the basis of race" (p. 42). In conclusion, the majority of the Court recognized the law school's compelling interest in attaining a diverse student body and affirmed the decision of the circuit court (*Grutter*, 2003). Twenty-five years later, the courts continued to evaluate the effectiveness of public university admissions practices and criteria and to debate the state's interest in having a diverse student body.

Summary

The Supreme Court found that the "law school's race-conscious admissions policy did not violate the [Equal Protection Clause of the] Fourteenth Amendment" (*Grutter*, 2003, p. 5) which affirmed the appellate court's decision to reverse the district court's injunction. In doing so, the Supreme Court held that "the law school had a compelling interest in attaining a diverse student body; and [that their] admission policy's race-conscious program bore the hallmark of a narrowly tailored plan (p. 6). They also "took the law school at its word that the law school would have liked nothing better than to find a race-neutral admissions formula" and would terminate the race-conscious program as soon as it is practical. (p. 6). The Court's decision to take the University of Michigan at its word exemplified their past deference to being involved in decisions best left to university professionals and reinforced their commitment to uphold decisions made in *Bakke* (1978) and *Sweezy* (1957). Even though the case lasted 59 months as it moved through the court system, *Grutter* served as one of the first Supreme Court cases in this millenium to uphold the university's right to make academic decisions.

Chapter Five: *Garcetti v. Ceballos*

Background

Richard Ceballos worked as a deputy district attorney in the Los Angeles County District Attorney's office. In February 2000, Ceballos was contacted by a defense counsel in a criminal case and asked to review the affidavits used by the police to obtain a critical search warrant to determine if there were inaccuracies (*Garcetti*, 2006). "After examining the affidavit and visiting the site, Ceballos determined that the affidavit contained serious misrepresentations. Ceballos relayed his findings to his supervisors, Carol Najear and Frank Sundstedt, and followed up with a deposition memorandum recommending dismissal of the case" (p. 8).

Based on Ceballos' statements, a meeting was held with Ceballos' supervisors and other employees of the sheriff's department to discuss the memo. The discussion became heated (*Garcetti*, 2006). Despite Ceballos' concerns, his supervisors who were also the petitioners in the case, proceeded with the prosecution (p. 1). "At the hearing on a defense motion to challenge the warrant, Ceballos recounted his observations but the trial judge rejected the challenge" (p. 6). "After the events, Ceballos claimed that he was subjected to a series of retaliatory employment actions [which] included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion" (Garcetti, 2006, p. 8). Ceballos filed a grievance with the department, which was denied. In January 2002, he initiated a lawsuit in the District Court for the Central District of California "claiming that petitioners then retaliated against him for his memo in violation of the First and Fourteenth

Amendments" (p. 6) rights for the employment retaliation based on his disposition memo.

Court Actions

Ceballos filed his lawsuit in the District Court for the Central District of California against the defendants, Gil Garcetti, Frank Sundstedt, and Carol Najera, for violating his First Amendment rights and retaliating against him. Garcetti et al. motioned for and were granted summary judgment on January 30, 2002 and the decision was appealed to the U.S. Court of Appeals for the Ninth Circuit. The appellate court reversed the lower court's decision in favor of Ceballos on March 22, 2004. The Supreme Court granted *certiorari* and, on March 30, 2006, reversed the appellate court's decision in favor of the defendants, allowing public employers to control employee speech that is part of their job responsibilities and adding a fifth part to the four part *Pickering/Connick* test. The new five-part test, called the *Garcetti/Pickering* analysis, evaluates whether an employee's speech is pursuant to their job duties. If so, there are no protections under the First Amendment. The progression of the case through the courts and the amicus brief filed by the American Association of University Professors (AAUP) are discussed in this chapter.

District Court for the Central District of California. In January 2002, Gil Garcetti, head of the Los Angeles District Attorney's Office, Sundedt, and Najra, filed a motion for summary judgment (*Garcetti*, 2002). In turn, Ceballos' alleged 1) a federal-law claim of "violations of his First and Fourteenth Amendment rights, and 2) a state law claim for intentional infliction of emotional distress (IIED)" (p. 1). Garcetti et al.

argued that they were entitled to summary judgment under the doctrine of qualified immunity for the first allegation. They "argue[d] there is no evidence of either outrageous conduct or severe emotional distress and [that] they [were] entitled to immunity under California Government Code Section 821.6" (p. 1). The Court held that Ceballos' constitutional free speech right was not protected because generating a disposition memo was pursuant to his duties as a public prosecutor and that it "was not 'clearly established' that [his] memorandum addressed a matter of public concern" (p. 6). "A right is 'clearly established' when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*Garcetti*, 2004, p. 13). Further, the court held that it "is sufficient to establish that the defendants are entitled to qualified immunity for their actions" (*Garcetti*, 2002, p. 6). In January 2002, the court granted summary judgment to Garcetti on Ceballos' federal-law claim because government officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (p. 4). The court also dismissed without prejudice the Ceballos' second state-law claim because "the court declined to exercise supplemental jurisdiction" (p. 6).

Court of Appeals for the Ninth Circuit. In June 2003, Ceballos appealed the summary judgment ruling to the U.S. Court of Appeals for the Ninth Circuit (*Garcetti*, 2004). The court of appeals determined that Ceballos' speech was of public concern and that, based on the *Pickering* balancing test, his interest in the speech outweighed the defendants' administrative interests to a productive and efficient workplace (*Garcetti*,

2004). The court held "that, for summary judgment purposes, his speech was protected by the First Amendment" (p. 12) and that the right was clearly established which means that "qualified immunity is unavailable" (p. 13) to the individual defendants. Without qualified immunity, the court determined that the county could not assert sovereign immunity or protections under the Eleventh Amendment unless Garcetti, the district attorney, was acting in his official capacity at the state level. The court held that Garcetti was acting in most respects in his county capacity when the retaliatory acts against Ceballos occurred. Therefore, Garcetti is "not entitled to Eleventh Amendment immunity, and thus the county may not seek summary adjudication on the ground that he was acting on behalf of the state" (p. 16). In October 2004, the court reversed the district court's decision and remanded the case for further proceedings.

Garcetti et al. filed a petition for on writ of *certiorari* with the Supreme Court. The "petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit" was granted on February 28, 2005 (*Garcetti*, 2005).

Amicus Brief. On July 21, 2005, the Thomas Jefferson Center for the Protection of Free Speech and the American Association of University Professors (AAUP) filed an amicus brief with the U.S. Supreme Court in the Ninth Circuit. "Amici urged affirmation of the judgment of the Court of Appeals" (American Association of University Professors, 2005, p. 6) and argued that (1) the "First Amendment protection for employee speech on matters of 'public interest' includes expression within the scope of the speakers's employment" (p. 8) and (2) academic freedom, an interest upon which the

[U.S. Supreme Court] has conferred special First Amendment protection, could be imperiled by a recasting of the 'public concern' doctrine" (p. 12).

The first argument urged affirmation of the court of appeals' judgment to recognize Ceballos' speech as a public employee protected under the First Amendment (American Association of University Professors, 2005). The second argument addressed the concern "that…lessening First Amendment protection for job-related public employee speech would threaten academic freedom" (p. 6). Amici stated that "controversial expression by university professors [related] to the subject matter of the speaker's academic expertise could be deemed unprotected under a diminished and distorted concept of 'public concern'" (p. 7) and when professors speak as public employees on controversial issues related to their area of expertise. Without protection, amici argued that professors would only be protected when speaking on subjects that are not in their area of expertise, which is at variance with the court's past actions. For these reason, amici submitted their brief in support of the court of appeals decision.

U.S. Supreme Court. On October 12, 2005 and March 21, 2006, the Supreme Court heard arguments from the defendants and the respondents. On May 30, 2006, the court ruled, in a 5-4 decision, that

> the employee's allegation of unconstitutional retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties. The employee did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. The First Amendment did not prohibit managerial discipline based on the employee's expressions made pursuant to official responsibilities. (*Garcetti*, 2006, p. 1)

"The Court reversed the judgment of the appellate court and remanded the case for further proceedings" (p. 1). Justice Kennedy wrote the majority opinion and was joined by Justices Roberts, Thomas, Scalia, and Alito. They held that

> (1) When public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes, and thus the First Amendment does not prohibit managerial discipline of such employees for such speech.
> (2) This result was consistent with the Supreme Court's precedents to the effect that government employees who make public statements outside the course of performing official duties retain some possibility of First Amendment protection.
> (3) This holding likewise was supported by the emphasis of the Supreme Court's precedents on affording government employers sufficient discretion to manage their operations.
> (4) A contrary rule would commit state and federal courts to a new, permanent, and intrusive role involving judicial oversight of communications among government employees and their superiors in the course of official business.
> (5) The deputy's allegation of unconstitutional retaliation failed, for the deputy had spoken (a) not as a private citizen, but (b) pursuant to his official duties as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case. (p. 4)

Kennedy added one reservation to his opinion concerning academic speech that "expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence" (p. 12). Because of this argument, the Court stated, "[w]e need not, and…do not, decide whether the analysis…conduct[ed] would apply in the same manner to a case involving speech related to scholarship or teaching" (p. 12). In support of First Amendment speech, Justice Stevens found no difference between speech made by a public employee and a citizen stating,

> (1) a government employee's supervisor could, consistent with the First Amendment, take corrective action when the employee's speech was inflammatory or misguided, but not when such speech was merely unwelcome; and

> (2) with respect to public employees, there was no categorical difference between speaking as a citizen and speaking in the course of one's employment. (p. 4)

Justice Souter, joined by Stevens and Ginsburg in dissent, expressed the opinion that

> (1) private and public interests in addressing official wrongdoing and threats to health and safety could outweigh the government's stake in the efficient implementation of policy;
>
> (2) a public employee commenting on subjects in the course of duties ought not to prevail on a First Amendment retaliation claim unless the employee (a) was speaking on a matter of unusual importance, and (b) satisfied high standards of responsibility in so speaking; and
>
> (3) because the deputy's action had alleged retaliation not only for submitting the memorandum, but also for making other statements--not all of which would have been made pursuant to official duties in any obvious sense--it would be open to the Court of Appeals, on remand, to consider any retaliation shown for those other statements. (p. 4)

Finally, Justice Breyer, in dissent, expressed the opinion that

> (1) the First Amendment sometimes authorized judicial actions based on a government employee's speech that (a) involved a matter of public concern, and (b) took place in the course of ordinary job-related duties;
>
> (2) this was so only in the presence of (a) augmented need for constitutional protection, and (b) diminished risk of undue judicial interference with governmental management of the public's affairs; and
>
> (3) these conditions were met in the case at hand. (p. 4)

The Court ruled that Ceballos did not speak as a citizen but as a public employee as part of his job duties and that their public employers have a right to control their speech and discipline their employees for said speech. While Kennedy recognized academic freedom as transient value, he left it up to the district courts to work out the details.

Analysis

The *Garcetti* case began in the District Court for the Central District of California in January 2002 and ended in the U.S. Supreme Court in May 2006 (53 months). The analysis of district court opinion, amicus brief, and court of appeals opinion identified 11 themes with 40, 120, 108, and 205 coded references respectively for a total of 473 coded references. The themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 5.1. The themes are sorted by the *Totals by Theme* column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions and brief.

Table 5.1

Coded References by Theme and Court

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
Expression pursuant to official job duties	5	17	25	44	91
First amendment	7	35	18	27	87
Speech as a public employee versus private citizen	1	7	8	44	60
Matter of public concern	5	17	12	24	58
Employers rights to control speech	0	5	16	30	51
Academic freedom	0	1	17	11	29
Immunity of public officials	18	10	0	1	29
Content-form-context of expression	3	7	9	4	23
Employers right to efficient operations	1	11	0	8	20
Adverse employment action	0	6	3	6	15
Whistleblower	0	4	0	6	10
Totals by court or brief	40	120	108	205	473

To validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all the opinions and briefs. The usage of each word was reviewed and assigned to each of the above themes. The first query scanned word frequency across all the court opinions to identify the 50 most prevalent, three or more letter keywords. The contextual usage of each keyword in each court opinion was analyzed to determine whether the individual keyword was significant or required one or more adjacent words from the opinions to improve meaning. Themes with no applicable keywords utilized the theme title or words within the title and were added to the list of keywords or phrases. The keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 29 remained relevant to the analysis and 21 were dropped due to irrelevance, vagueness, or lack specificity. Seventeen of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. Ten phrases consisting of keywords and adjacent words in the opinions or theme titles were identified. Each keyword and phrase was aligned with one of the 11 themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion. Each occurrence in each opinion was reviewed to eliminate redundancy and duplicity of reference counts. Where redundancy was found, the query was refined and rerun. The query results were

tabulated by court opinion and sorted in descending order by *Totals by Theme* column. The results are provided in Table 5.2.

Table 5.2

Keywords and Phrases Totaled Theme and Court Cases or Brief and Sorted by Theme

Themes	Key words	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
First Amendment	First amendment, free speech, protected speech	13	80	49	65	207
Expression pursuant to official job duties	Pursuant, official duties, job duties, employment	3	53	5	82	143
Matter of public concern	Matter, concern, citizen	19	49	31	26	125
Speech as a public employee versus private citizen	Employee speech, private citizen, government employee	5	38	9	42	94
Immunity of public officials	Summary judgment, qualified immunity	31	39	2	7	79
Academic freedom	Academic freedom	0	0	43	4	47
Employer's right to control employee speech	Control, restricting speech	1	8	3	11	23
Employers right to maintain efficient operations	Efficiency, disruption	2	14	0	3	19
Content-form-context of expression	Content, form, context	1	14	1	2	18
Whistleblower	Whistle	0	2	0	9	11
Adverse employment action	Adverse employment	0	4	0	0	4

The theme rankings in Tables 5.1 and 5.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in Tables 5.1 and 5.2, the

four most prevalent themes in descending order were expression pursuant to official job duties, First Amendment, speech as a public employee versus private citizen, and matter of public concern. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 5.3. The highest correlations were between the expression pursuant to official job duties and First Amendment themes (0.96912) and the matter of public concern and First Amendment themes (0.95892).

Table 5.3

Pearson Correlation of Prevalent Themes

Theme	Expression pursuant to official job duties	First Amendment	Speech as a public employee versus private citizen	Matter of public concern
Expression pursuant to official job duties	1.00000	0.96912	0.96912	0.94166
First Amendment	0.96912	1.00000	0.95343	0.95892
Speech as a public employee versus private citizen	0.95421	0.95343	1.00000	0.93985
Matter of public concern	0.94166	0.95892	0.93985	1.00000

These themes are discussed based on the order provided in Table 5.4.

Table 5.4

Number of Coded References of Prevalent Themes by Court Opinion and Brief

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
Expression pursuant to official job duties	5	17	25	44	91
First Amendment	7	35	18	27	87
Speech as a public employee versus private citizen	1	7	8	44	60
Matter of public concern	5	17	12	24	58
Totals by court and brief	18	76	63	139	296

A line graph of Table 5.4's coded references by opinion and brief is provided in Figure 5.1.

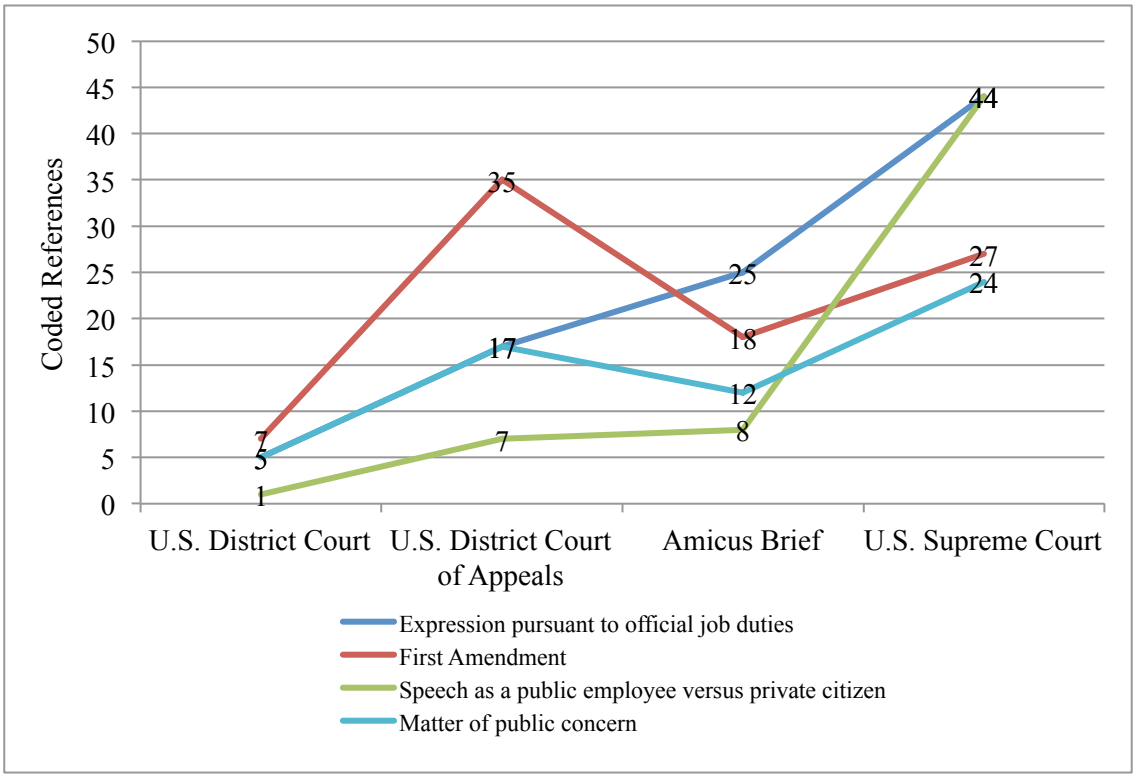


Figure 5.1. Four Most Prevalent Themes Based on Coded References

Expression pursuant to official job duties. The dominant theme was expression pursuant to official job duties. The theme concentrated on all written and verbal expression made by Ceballos as he conducted his official job duties and responsibilities as a deputy district attorney. Ninety-one references were coded from the cases and brief with 5, 17, 25, and 44 in the district court, court of appeals, amicus brief, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, First Amendment, speech as a public employee versus private citizen, employer's right to control speech, matters of public concern, and academic freedom themes 42, 34, 28, 20, and 14 times respectively. These themes dominated the discussion of the expression pursuant to official job duties theme. Table 5.5 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these five themes relate to the expression pursuant to official job duties theme.

Table 5.5

Matrix Coding of the Five Prevalent Themes That Overlap the Expression Pursuant to Official Job Duties Theme

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
First Amendment	2	12	12	16	42
Speech as a public employee versus private citizen	1	2	6	25	34
Employer's right to control speech	0	1	10	17	28
Matters of public concern	2	4	8	6	20
Academic freedom	0	1	7	6	14

District Court for the Central District of California. The district court evaluated Ceballos' speech from the perspective of the employee's First Amendment right to speak on matters of public concern. The court referenced *Connick* to define the jurisdiction for handling workplace expression in stating that Ceballos'

> argument is premised on *Connick*…where the Supreme Court held that 'when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (*Garcetti*, 2002, p. 5)

Testimony determined that Ceballos' expression, a disposition memo, was not requested by his supervisors but that, because Ceballos' lawyer acknowledged that Ceballos' expression was common for a prosecutor, he admitted that it was "pursuant to his duties as a prosecutor " (p. 5). As his duties included "exposing possible perjured testimony" which was the purpose of the memo, the court found that his speech was not protected by the First Amendment.

Court of Appeals for the Ninth Circuit. The court of appeals discussed Ceballos' expression as a matter of public concern, which may or may not be protected from employer discipline by First Amendment. To determine whether his expression is protected, the Court used *Connick* "to distinguished between speech "as a citizen upon matters of public concern" at one end and speech "as an employee upon matters only of personal interest" (p. 8). The court stated,

> [t]he right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, are

> positioned uniquely to contribute to the debate on matters of public concern. (p. 9)

The court added that "[s]tripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations" (p. 9) and "inconsistent with the very nature of the *Connick* test" (p. 11). As such, the majority found that "Ceballos was doing his job by investigating allegations of law enforcement misconduct in a case being prosecuted under his direction and reporting those that appeared to be meritorious to his supervisors" (p. 12) and that his speech was protected by the First Amendment.

In concurrence, Judge O'Scannlain discussed his concern for an employee's personal stake in his or her job-related speech. He contended,

> that when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right. Instead, their speech is, in actuality, the State's. (p. 19)

He added,

> *Connick* teaches that although speech uttered by public employees must address an issue of public import in order to come within the protective shelter of the First Amendment, satisfaction of such a virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action. Instead, employee speech solicits the protection of the First Amendment only when it also results from the employee's decision to express his or her *personal* opinions--that is, those views he or she holds *as a citizen* and not as a public employee. The First Amendment, in short, does not protect public employees' routine and required speech on behalf of the government. (p. 22)

While he did not disagree with the court's conclusion, he stated that it is time "to reappraise our jurisprudence concerning the free speech rights of the publicly-employed and the scope of legitimate governmental regulation in its capacity as employer" (p. 22).

Amicus brief. The AAUP wrote the amicus brief and linked the Supreme Court's recognition of academic freedom as a special interest of the First Amendment with the employee's right to speak on matters of public concern. Amici's concerns focused on two connected ideals; that "any suggestion that [an employee would] forfeit First Amendment protection because [their speech is] job-related, or…made within the speaker's scope of employment, would be seriously at variance with the central premises of this Court's decisions" (American Association of University Professors, 2005, p. 6) and that lessening First Amendment protection for job-related public employee speech would threaten academic freedom. The concerns were discussed in the context of the employee's right to speak freely on matters of public concern and the faculty right to speak freely on topics related to their profession without fear of reprisal. The concept of the faculty member as a public employee was of specific interest.

Amici agreed with the Court's conclusion that Ceballos's speech was protected by the First Amendment. Amici stated that this "view was consistent with the Court's judgment in [*Connick*] which set forth the criteria that have since been applied to distinguish between protected speech 'as a citizen upon matters of public concern' and unprotected speech 'as an employee upon matters only of personal interest'" (p. 9). Amici argued that "none of *Connick*'s disqualifying characteristics [existed] in this case" and that finding to the contrary

> would pose daunting tasks for the lower courts [and seriously diminish] First Amendment protection for a vital sector of expression, that of public employees on matters of public concern that may relate to their assigned responsibilities or may occur within the workplace. (p. 11)

As such, amici urged the Supreme Court to validate the court of appeals holding that employee speech pursuant to job duties is protected by the First Amendment.

Second, amici requested that the Supreme Court reaffirm its support for academic freedom as a special concern of the First Amendment by upholding the court of appeals' decision. Amici argued,

> the present case derives directly from this unwavering affirmation of academic freedom as a core First Amendment interest. The central premises of such protection would be poorly served – indeed, could be gravely undermined – by a narrowing of the "public concern" doctrine to exclude job-related expression. (p. 14)

The effect on faculty of reversing the court's decision "would introduce a perverse irony [where] First Amendment academic freedom would extend *only* to those public statements on which faculty members were least well informed…Only those statements clearly beyond academic expertise would be considered matters of public concern" (p. 24). As such, amici requested the court of appeals decision to be upheld by the Supreme Court.

U.S. Supreme Court. The Supreme Court focused on whether Ceballos' expressions were made pursuant to his job responsibilities (*Garcetti*, 2006). The court held (a) that, "when public employees speak in the course of the routine, required employment obligations, that they have no personal interest in the content of that speech that gives rise to a First Amendment right" (p. 5), (b) "the Constitution does not insulate their communications from employer discipline" (p. 9), and (c) "[e]mployers have a heightened interests in controlling speech made by an employee in his or her professional capacity" (p. 11). The court used these guiding principles to evaluate

Ceballos' right to First Amendment protection of his job-related expression. Justice Kennedy wrote the majority opinion and Justice Souter the dissenting opinion.

First, the court ruled that Ceballos' expression was made as part of his employment obligations. Kennedy stated,

> Ceballos wrote his deposition letter because it is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. (pp. 9-10)

He added,

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. (p. 10)

As such, his speech was not owned by him and, therefore not protected by the First Amendment.

Justice Stevens rebutted stating that "[t]he proper answer to the question of 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,'…is 'Sometimes,' not 'Never'" (p. 2). He reminded the Court of Justice Rehnquist's unanimous decision in *Givan,* which rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly" (p. 1). He argued that, "it is senseless to let constitutional protection…hinge on whether [an employee's words] fall within a job description" (p. 2).

Second, because Ceballos had no personal interest in his expression, the court held that his employer had the right to discipline him. Kennedy affirmed that

> [s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action. (p. 7)

He stated that "[t]o hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers" (p. 11). Kennedy concluded that Ceballos' employer had the right to discipline him for his speech as it was pursuant to his job duties.

Justice Souter rebutted that employee's as citizen servants have an obligation to speak in their areas of expertise without fear of reprisal. He stated that "[t]here is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak, as any responsible citizen would" (p. 6). If disciplined, employees may cease to contribute to the public good. He added that "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (p. 7). He concluded that "[i]t is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees" (p. 8) and dissented from the majority.

Third, the court recognized the employer's right to control employee speech to ensure integrity in their operations. Kennedy acknowledged that, "a government entity

has broader discretion to restrict speech…that has some potential to affect its operations" (p. 2). The dissenting justices recognized the "need to afford government employers sufficient discretion to manage their operations" (p. 3) and agreed with the majority stating, that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service" (p. 7). Souter cautioned the court that the majority's holding could have a negative impact on academic freedom suggesting that

> today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. (p. 13)

The court recognized Souter's note but the majority granted employers the right to control speech made pursuant to their official job duties.

First Amendment. The second most prevalent theme was First Amendment. The theme concentrated on the court's discussion of Ceballos' speech rights based on protections provided by the First Amendment and holdings of previous the courts. Eighty-seven references were coded from the cases and brief with 7, 35, 18, and 27 in the district court, court of appeals, amicus brief, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, matters of public concern, speech as a public employee versus private citizen, employer's right to control speech, and academic freedom themes 42, 33, 26, 18, and 12 times respectively. These themes dominated the discussion of the First Amendment theme. Table 5.6

provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these five themes relate to the First Amendment theme.

Table 5.6

Matrix Coding of Five Prevalent Themes That Overlap the First Amendment Theme

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
Expression pursuant to official job duties	2	12	12	16	42
Matters of public concern	4	12	8	9	33
Speech as a public employee versus private citizen	0	7	2	17	26
Employer's right to control speech	0	2	6	10	18
Academic freedom	0	1	9	2	12

District Court for the Central District of California. The district court discussed Ceballos' First Amendment right in the context of whether his speech as an employee was protected when he spoke on matters of public concern. Using the *Pickering/Connick* balancing test, the court decided if his statements addressed a matter of public concern and "weigh the interests of the employee in commenting on matters of public concern with the interest of the State, as an employer, in promoting the efficiency of the public services it performs" (Garcetti, 2002, p. 4). Judge Matz added that if the court determined that,

> the statements do not address matters of public concern, the First Amendment is not triggered and it is unnecessary to scrutinize the reasons for the employer's action [and that] even if [Ceballos was] able to show that his statements were of

> public concern, that [it was] not sufficient, standing alone, to warrant constitutional protection. (p. 4)

As such, the court "scrutinize[d] the content, form and context of the statement" (p. 4) in order to determine if Ceballos wrote his memo as part of his job. After a review of the "precise context in which [Ceballos] uttered his speech, [the court] establish[ed] that, in fact, it was not constitutionally-protected" (p. 6).

Court of Appeals for the Ninth Circuit. The court of appeals discussed Ceballos' First Amendment rights in the context of his speech as a public employee. Whether Ceballos spoke in this role as a matter of public concern and whether his speech was protected or part of his daily job duties, was the focus of Circuit Judge Reinhart's opinion. Reinhart inferred that "[a]lthough public employees do not relinquish their right to free speech by virtue of their employment, neither do they enjoy absolute First Amendment rights" (*Garcetti*, 2004, p. 7). To determine whether Ceballos was protected, Reinhart stated that the court is required to

> (1)…ask whether the speech addresses a matter of public concern, and, if it does,
>
> (2)…engage in an inquiry, commonly known as the *Pickering* balancing test, to determine whether Ceballos's interest in expressing himself outweighs the government's interests in promoting workplace efficiency and avoiding workplace disruption. (p. 8)

He discussed each requirement to determine Ceballos' right to First Amendment protection.

First, Reinhart debated whether the issues Ceballos' memo was a matter of public concern. To be successful, Reinhart stated,

> Speech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection. In contrast, speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies, is generally not of public concern. (p. 8)

He concluded that Ceballos' speech as a matter of public concern, stating,

> the right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, are positioned uniquely to contribute to the debate on matters of public concern. (p. 9)

He added that "[s]tripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations" (p. 9) and that "[t]he mere fact that a public employee exposes individual wrongdoing or government misdeeds when making a regular as opposed to a special report does not, by itself, result in the denial of First Amendment protection" (p. 11). As such, Reinhart determined that the full *Connick* balancing test should be applied to Ceballos' right as a public employee to speak as a concerned citizen.

The court applied the two-step *Pickering/Connick* balance test to weigh Ceballos' speech, a memo, against the "government's interests in promoting workplace efficiency and avoiding workplace disruption" (p. 8). Reinhart stated that the burden of proof was on the employer and that "the decisive question [was] whether the employee spoke with the intention of bringing wrongdoing to light" (p. 11). Reinhart added that,

even if Ceballos' memo proved to be erroneous, court precedence protected the right of public employee speech. He concluded that "the individual defendants [had] not meet their burden under *Pickering* because they [had offered] no explanation as to how Ceballos's memorandum to his supervisors resulted in inefficiency or office disruption" (p. 12) and held that "Ceballos' speech addressed a matter of public concern and his interest in the speech outweighed the defendants' administrative interests" (p. 12).

Circuit Judge O'Scannlain in his dissenting opinion disagreed with the majority. He argued that, "Ceballos had no *personal* stake (other than in doing his job well), and no cognizable First Amendment interest, in the speech for which he now seeks protection" (p. 19). He reasoned,

> when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right [and that] their speech is, in actuality, the State's. (p. 19)

He added,

> employee speech solicits the protection of the First Amendment only when it also results from the employee's decision to express his or her *personal* opinions--that is, those views he or she holds *as a citizen* and not as a public employee. The First Amendment, in short, does not protect public employees' routine and required speech on behalf of the government. (p. 22)

O'Scannlain dissented that Ceballos had no First Amendment right to his speech and, therefore, was not entitled to protection.

Amicus brief. The American Association of University professors (AAUP) discussed the First Amendment in relation to role of the faculty as public employees to speak on matters of public concern and the amendment's special concern for faculty academic freedom when expressing views related to their profession. Amici agreed with

the court of appeals decision that Ceballos' "speech was fully protected by the First Amendment, addressing as it did a matter of public concern, no less because it occurred within the workplace and related to issues within respondent's assigned area of responsibility as a prosecutor" (American Association of University Professors, 2005, p. 8). Amici reiterated "the dangers of infringing upon such highly sensitive areas as freedom of speech…and freedom of communication of ideas, particularly in the academic community" (p. 13). Amici added that the courts

> have never suggested that First Amendment protection for professorial expression diminishes with proximity to the core of a teacher's or scholar's assigned tasks. [When] some courts have been less inclined to grant protection to speech unrelated to the academic setting and the campus community, [the] *Pickering-Connick* principles fully encompass, and accord First Amendment protection to, professorial speech – without regard to the relationship between that speech and a scholar's academic discipline or assigned area of curricular responsibility. (p. 18)

Amici warned that any dilution of these standards "would introduce a perverse irony [where] First Amendment academic freedom would extend *only* to those public statements on which faculty members were least well informed [with only] statements clearly beyond academic expertise [being] considered matters of public concern" (p. 24). As such, amici concluded that any rule making none job-related speech by public employees constitutionally unprotected "could undermine the First Amendment protections traditionally afforded faculty speech and ignore the special sensitivity this Court has paid in applying the First Amendment to colleges and universities" (p. 26). The AAUP requested the court to uphold the lower court's decision.

U.S. Supreme Court. The Supreme Court discussed First Amendment speech rights in the context of Ceballos' right to speak as an employee on matters of public

concern versus his employer's right to control his speech because it was made pursuant to his job responsibilities. Inherent throughout Justice Kennedy's analysis was a discussion of the dichotomy between the employee's responsibility as a citizen to uncover wrong doing versus the employer's right to control speech that affects their operations.

In the majority opinion, Kennedy recognized public employee speech rights. He stated that (a) "public employees do not surrender all their First Amendment rights by reason of their employment" (*Garcetti*, 2005, p. 9) (b) "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern" (p. 9) and (c) "the First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens" (p. 10). He added that, "while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance" (p. 11). As such, he stated that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline" (p. 11). Because Ceballos' memo was created as part of his official job duties, the court held that Ceballos acted within his role as a public employee and had no claim for protection from employer discipline under the First Amendment.

Justices Souter and Breyer disagreed. Justice Souter dissented stating that "[o]pen speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment" (p. 14). He added that

> [t]his significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. (p. 14)

He included the special concerns of the First Amendment to protect the academic freedom of faculty, reiterating the minority opinion in *Grutter* that,

> [t]his ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." (p. 18)

In addition, Breyer wrote that public employee speech such as the Ceballos' memo warrants protection when it

> both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties [and] it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. (pp. 22-23)

He added that these conditions had been satisfied and that the balancing test was appropriate. But, the majority of the court held that public employers are within their rights to control their employee's speech when it is determined to be part of their job duties and to discipline them for their speech when it effects their operations.

Speech as a public employee versus private citizen. The third most prevalent theme was speech as a public employee versus private citizen. The theme focused on the difference between a public employee's rights to speak freely as a citizen and the public employer's right to curtail employee speech that interrupts the efficiency of their operations. Sixty references were coded from the cases and brief with 1, 7, 8, and 44 in the district court, court of appeals, amicus brief, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, First Amendment, employer's right to control speech, and matters of public concern themes 34, 26, 20, and 20 times respectively. These themes dominated the discussion of the speech as a public employee versus private citizen theme. Table 5.7 provides the results of individual queries of each opinion and brief. The analysis includes examples showing how these five themes relate to the speech as a public employee versus private citizen theme.

Table 5.7

Matrix Coding of Five Prevalent Themes That Overlap the Speech as a Public Employee Versus Private Citizen Theme

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by theme
Expression pursuant to official job duties	1	2	6	25	34
First Amendment	0	7	2	17	26
Employer's right to control speech	0	0	3	17	20
Matter of public concern	1	3	2	14	20
Academic freedom	0	0	3	6	9

District Court for the Central District of California. The district court discussed the theme in reference to the federal court's reluctance to interfere when employee speech is not a matter of public concern. Based on the court cases referenced by the defendants, Judge Matz recognized that

> federal courts have held that speech engaged is not merely as a concerned citizen but within the scope of the plaintiff's employment does not address a matter of public concern, even if the incident that triggered the speech may itself be a matter of public concern. (*Garcetti*, 2002, p. 5)

As such, the district court held that Ceballos' speech was not protected.

Court of Appeals for the Ninth Circuit. The court of appeals discussed the conflict between Ceballos' speech as a public employee versus a private citizen within the context of whether it was a matter of public concern or an aggrieved employee disputing an employer's decision. In his majority opinion, Circuit Judge Reinhart reminded the court that "[a]lthough public employees do not relinquish their right to free speech by virtue of their employment, neither do they enjoy absolute First Amendment rights" (*Garcetti*, 2004, p. 7). He contextualized the differences in the two types of speech stating,

> [s]peech that concerns issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government merits the highest degree of first amendment protection. In contrast, speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies, is generally not of public concern. (*Garcetti*, 2004, p. 8)

In concurring with the majority's holding, Judge O'Scannlain added that "the implicit premise underlying the First Amendment's hostility toward viewpoint-driven rules abridging the freedom of speech is that such constraints impermissibly infringe upon individuals' freedom of choice to express *their personal* opinions or to otherwise express *themselves*" (p. 19). He added that

> *Connick* teaches that although speech uttered by public employees must address an issue of public import in order to come within the protective shelter of the First Amendment, satisfaction of such a virtually necessary condition is not by itself sufficient to trigger constitutional constraints on governmental action. Instead, employee speech solicits the protection of the First Amendment only when it also results from the employee's decision to express his or her *personal* opinions--that is, those views he or she holds *as a citizen* and not as a public employee. The First Amendment, in short, does not protect public employees' routine and required speech on behalf of the government. (p. 22)

The court did not rule on whether Ceballos' speech was protected as the lower court focused on the defendant's right to 11th Amendment immunity. Instead the court remanded the case for further proceedings.

Amicus brief. Amici focused on the right of a faculty member as a public employee to speak freely on topics that are within his or her profession and are a matter of public concern. Amici provided two reasons for supporting the court of appeals decision. First, amici argued that not upholding the decision would "depart radically from the unanimous consensus of the federal courts of appeals, all of which have been consistent with the judgment of the Ninth Circuit in this case" (American Association of University Professors, 2005, p. 6). Amici added that "First Amendment protection on the speech of public employees that deals with matters of public concern…has never excluded, nor treated less favorably, expression of public employees that relates to the

speaker's position or assigned responsibilities" (p. 6). Second, amici expressed their concern that

> lessening First Amendment protection for job-related public employee speech would threaten academic freedom [adding that much] potentially controversial expression by university professors relates to the subject matter of the speaker's academic expertise, and could thus be deemed unprotected under a diminished and distorted concept of "public concern." (American Association of University Professors, 2005, p. 7)

Amici agreed with the court of appeals holding that Ceballos' speech was protected by the First Amendment as it was consistent with the Supreme "Court's judgment in *Connick*…which set forth the criteria that have since been applied to distinguish between protected speech 'as a citizen upon matters of public concern' and unprotected speech 'as an employee upon matters only of personal interest'" (p. 8). As such, amici urged the court to "reaffirm its commitments to the current concept of 'matters of public concern' in regard to the speech of public employees and to its longstanding recognition of academic freedom as a 'special concern' of the First Amendment" (p. 1) and to uphold the court of appeal's decision.

U.S. Supreme Court. The Supreme Court discussed Ceballos' speech in relation to being part of his official job duties and the government's right as his employer to control and restrict that speech even when it addressed a matter of public concern. In his majority opinion, Justice Kennedy stated,

> [the] Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment [and that] the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *(Garcetti*, 2006, p. 9)

Kennedy added that, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom [but the g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions" (p. 10) in order to maintain efficient operations. Kennedy concluded that the Ceballos' memo was written pursuant to his job duties and that his employer had the right to control his speech. He added that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen" (p. 11), recognizing that this restriction does not prevent him or her from participating in public debate as a citizen. Kennedy left amici's academic freedom concerns for another court to decide stating that the Supreme Court "need not, and for that reason do not, decide whether the analysis [conducted] today would apply in the same manner to a case involving speech related to scholarship or teaching" (p. 12) focusing only on the government's need to control speech as a method of maintaining efficiency. As such, the majority concluded "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline" (p. 14). The Supreme Court reversed the court of appeals decision and remanded the case for further proceedings.

In his dissenting opinion, Justice Stevens disagreed with Kennedy's narrow interpretation of the First Amendment. To the question of whether the First Amendment protects a government employee from discipline based on speech made pursuant to the

employee's official duties, he responded, "sometimes, not never" (p. 13). Stevens argued,

> [the] notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong [and that], it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors. (p. 14)

Justice Souter joined Stevens in dissent contending that public employees are obligated to speak out on matters of public concern and that the government must protect such speech when

> [the] private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection. (p. 14)

Souter added that "the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that…these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract" (p. 15). Steven and Souter were joined by Justices Ginsburg and Breyer in their dissent from the majority's decision.

Matters of public concern. The fourth most prevalent theme is matters of public concern. The theme is the first step of the *Pickering-Connick* balance test and was referenced in all cases and briefs. It focused on Ceballos's right as a public employee to speak on issues that are a public concern to private citizens such as government corruption or inefficiencies. The 58 references were coded from the cases and brief with 5, 17, 12, and 24 in the district court, court of appeals, amicus brief, and Supreme Court respectively. Based on a matrix coding query of all themes and reference coding bands

within the opinions and brief, the theme coding overlapped the First Amendment, expression pursuant to official job duties, speech as a public employee versus private citizen, and employer's right to efficient operations theme coding 33, 20, 20, and 10 times respectively. Table 5.8 provides the results of individual queries of each opinion and brief. The analysis includes examples of how these four themes relate to the matters of public concern theme.

Table 5.8

Matrix Coding of Four Prevalent Themes That Overlap the Matters of Public Concern Theme

Themes	District Court	Court of Appeals	Amicus Brief	U.S. Supreme Court	Totals by Theme
First Amendment	4	12	8	9	33
Expression pursuant to official job duties	2	4	8	6	20
Speech as a public employee versus private citizen	1	3	2	14	20
Employer's right to efficient operation	1	5	0	4	10

District Court for the Central District of California. The district court discussed the theme in the context of the *Pickering/Connick* balancing test. Judge Matz stated that "the court [must] test the reasons for restriction against First Amendment standards [and, in] doing so, the court… must weigh the interests of the employee in commenting on matters of public concern with the interest of the State, as an employer, in promoting the efficiency of the public services it performs" (*Garcetti*, 2002, p. 4). He added, "the court must give government employers 'wide discretion and control over the management of [their] personnel and internal affairs'" (p. 4). Matz's analysis determined that, even

though Ceballos' speech was a matter of public concern, it was not a matter for the federal courts to decide. Referencing *Connick*, Matz stated,

> when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (p. 5)

Matz stated,

> [d]espite the intrinsic and important public interest in excluding perjured evidence from court proceedings, however, the mere significance of that issue does not establish that Ceballos's views addressed an issue of public concern for purposes of the First Amendment, because (as defendants argue) he wrote it as part of his job. (p. 5)

As such, he determined that Ceballos' speech was not protected, but because the defendants were granted summary judgment based on the Eleventh Amendment, all of Caballos' speech claims were dismissed.

Court of Appeals for the Ninth Circuit. The court of appeals discussed Ceballos's speech from the perspective of the public employee's job duties and the employer's right to maintain efficient operations. Circuit Judge Reinhart established,

> the right of public employees to speak freely on matters of public concern is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, 'are positioned uniquely to contribute to the debate on matters of public concern'. Stripping them of that right when they report wrongdoing or other significant matters to their supervisors would seriously undermine our ability to maintain the integrity of our governmental operations. (*Garcetti*, 2005, p. 9)

Rienhart argued that, "[r]egardless of the forum in which a government worker makes charges of corruption, criminal misconduct, or public waste, such charges raise serious

public concerns that merit careful assessment and justify full application of the *Connick* principles" (p. 11). Even if Ceballos' speech is found to be false, Reinhart reminded that,

> to encourage public employees to speak out on matters of public concern, [the court has found that,] while false statements are not deserving, in themselves, of constitutional protection, erroneous statement is inevitable in free debate, and…it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need…to survive.' (p. 12)

While the defendants contend that Ceballo's speech was disruptive, Reinhart found that his "speech addressed a matter of public concern and his interest in the speech outweighed the defendants' administrative interests" (p. 12). As such, Reinhart held that Ceballos' speech was protected by the First Amendment.

Amicus brief. Amici discussed the effect that reversing the court of appeal's decision would have on university faculty if government employers were allowed to restrict employee speech that is part of their job duties. Their concern was that "lessening First Amendment protection for job-related public employee speech would threaten academic freedom [and leave] controversial expression by university professors [on] subject matter of the speaker's academic expertise…unprotected under a diminished and distorted concept of 'public concern'" (American Association of University Professors, 2005, p. 7). Amici argued that "any suggestion that matters of public concern may not encompass job-related expression of professors would undermine the special protections the Court has given academic freedom for the past 50 years" (p. 7). Amici added,

> consequences of such a retreat could be truly frightening not only for the academic freedom of outspoken professors, but equally for students and for the larger society that now benefits from the First Amendment protection that scholars enjoy to speak publicly within their areas of expertise. (p. 24)

The irony would be that,

> First Amendment academic freedom would extend *only* to those public statements on which faculty members were least well informed–matters that fell totally outside the fields in which they study and teach. Only those statements clearly beyond academic expertise would be considered matters of public concern. (p. 24)

As such, amici urged the Supreme Court to uphold the court of appeals decision and be sensitive to how their decision affects public universities and the First Amendment's special concerns for academic freedom.

U.S. Supreme Court. The Supreme Court focused on Ceballos' right as a public employee and citizen to speak on matters of public concern and the government employer's right to control speech in order to maintain efficient operations. First and foremost, Justice Kennedy acknowledged that

> the Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment [and that] the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. (*Garcetti*, 2006, p. 9)

He stated, as "long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively" (p. 10). He clarified these speech restrictions by stating,

> an employee speaking as a citizen…with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit

> thought to flow from the statements. Entitlement to protection is thus not absolute. (p. 14)

While Kennedy recognized that "open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment" (p. 14), he also stated that "[g]overnment employees are often in the best position to know what ails the agencies for which they work" (p. 14) and that the "interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (p. 16). As such the majority reversed the court of appeals decision and added a preliminary part to the *Pickering-Connick* test to determine whether an employee is speaking as a private citizen or a public employee as part of their job official duties.

Summary

In *Garcetti* (2007), the Supreme Court ruled that when public employees make statements pursuant to their official duties, their speech is not protected by the First Amendment and they could be disciplined by their employer even if they are speaking on an issue of public concern (Levinson, 2007). The *Garcetti* decision added a preliminary step to the *Pickering* balancing test. "The first step determines whether the employee spoke as a citizen on a matter of public concern" (Griffin, 2007, p. 153). The second step invokes the *Pickering* test "to determine whether the employer had a reason to treat the public employee differently from a member of the general public" (p. 153). The two-part *Garcetti* test created a measure for employee speech and provided government employers with broad discretion over their operations (Griffin, 2007).

Griffin comments that this "test eliminates judicial balancing and replaces it with definite boundaries that are clear to both the employee and employer" (p. 54).

The question of whether *Garcetti* affects teaching and scholarship was raised by Justice Souter who expressed the hope that the majority decision "does not imperil the First Amendment protection of academic freedom in public colleges and universities" (DelFattore, 2011, para. 7). The court responded with the "*Garcetti* reservation" recognizing that the court's analysis did not apply in the same manner to a case involving speech related to academic scholarship and classroom instruction (DelFattorre, 2011). The *Garcetti* decision created uncertainties for faculty when they speak as department chairs or committee members on non-academic issues. These rulings could result in faculty refraining from actively participating in decision-making and remaining silent on academic and university issues that they consider controversial.

Chapter Six: *Schrier v. University of Colorado*

Background

In May 2003, the Plaintiff, Dr. Robert Schrier M.D., filed a civil action in the Colorado District Court against the University of Colorado System (UCS) and three employees, "President Elizabeth Hoffman, Dean Richard D. Krugman, M.D., and Chancellor James H. Shore, M.D., in their official capacities" (*Schrier*, 2005, p. 5). The lawsuit alleged that the Plaintiff was terminated as Chair of the Department of Medicine at the UC Health Sciences Center in retaliation for speaking publicly against the move of the University's Medical School in Denver to a new location in Aurora, CO. During the case hearings, the Plaintiff conceded that he had "been an active participant in that debate since the initial announcement of the move proposal" (p. 5). His concerns as chair of the department and a tenured faculty member focused on "the fiscal implications of the move and his view that the move would disrupt integrated programs within the School of Medicine" (p. 6). The move had been discussed since the mid-1990s and was approved by the Board of Regents in 1998.

Dr. Schrier was removed as Chair of the Department of Medicine by Dean Krugman on October 10, 2002. Health Science Center faculty were not consulted about Dr. Schrier's removal because the University maintained that "department chairs within the School of Medicine serve at the will of the Dean [and that the removal] did not constitute a disciplinary action" (p. 6). "Dr. Schrier retained his tenured appointment as faculty member and full professor of medicine within the University and currently draws a salary identical to the one he received as Chair" (p. 6). These actions prompted Schrier

to file a lawsuit in the District Court for the County and City of Denver for reinstatement as department chair.

Court Actions

The *Schrier* case began in the District Court for the City and County of Colorado in October 2003 and ended in the U.S. Court of Appeals for the 10th Circuit on October 2005. The district court denied Shrier's injunctive claim relief for his removal as department head and found no textual basis in the Constitution for Shrier's constitutional right to academic freedom claim (*Schrier*, 2002). The court of appeals affirmed and stated,

> that the right to academic freedom is not "a subset of the First Amendment, separate and distinct from the fundamental right of free speech [and refusing] to endorse any suggestion that speech in an academic setting concerning the operations of a university enjoys greater constitutional protection than does political speech in the public forum." (*Schrier*, 2005, pp. 22-23)

The decision discounted the cases such as Sweezy (1957), Keyishian (1967), Bakke (1978), Ewing (1985) in which academic freedom was recognized as a "special concern" of the First Amendment and provided public universities with the control over role-based faculty speech in order to maintain efficient operations.

District Court for the City and County of Colorado. On February 19, 2003, the U.S. District Court of Colorado, with the consent of both parties, granted UCS's motion to move the case to the Federal court for a hearing along with the recommendation on the Plaintiff's motion for preliminary injunction.

Federal District Court. On May 19, 2003, Magistrate Judge Borland heard the motion to consolidate Schrier's preliminary and permanent injunctions (*Schrier*, 2005).

> In order to be entitled to…a preliminary injunction…, the moving party must establish that: (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury…outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits. (p. 7)

On June 12 2003, Borland denied Schrier's requested motion "citing the existence of issues of fact to be tried by a jury and stating that no further recommendation…concerning [his] right to a permanent injunction is possible or appropriate" (p. 1).

Amicus Brief. In December 2003, the AAUP filed an amicus brief with the United States Court of Appeals for the Tenth Circuit. The AAUP requested that the "court reverse the holding of the district court that the appellant, Dr. Robert W. Schrier, does not have a First Amendment right to academic freedom" (American Association of University Professors, 2003, p. 2). The AAUP disagreed with the decision of the District Court that,

> Dr. Schrier's status as a university professor who serves as a department chair entitled him to no rights distinctive from those of any other public employee violated his academic freedom…is in direct conflict with controlling authority that recognizes academic freedom as a "special concern" of the First Amendment. (p. 3)

The AAUP requested that the Court recognize Dr. Schrier's right to academic freedom and, at a minimum, "reject the District Court's decision that no First Amendment right to academic freedom exists" (p. 3).

The AAUP disputed the district court statement that "academic freedom is not a 'subset of the First Amendment, separate and distinct from the fundamental right of free speech'" (p. 4) and argued,

> [they] did not examine Dr. Schrier's speech to determine the extent to which his statements reflected his academic views and thus would fall within his First Amendment right to academic freedom, as opposed to actually obstructing the operations of the University, which would be beyond the protection of the First Amendment. (p. 4)

Defending Dr. Schrier's academic speech rights, the AAUP cited the Supreme Court's recognition, in *Sweezy* (1957), of the faculty's right to academic freedom and political expression and warned that imposing "any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation [and endanger] such highly sensitive areas as freedom of speech…and freedom of communication of ideas, particularly in the academic community" (p. 5).

The AAUP argued that the Supreme Court provided higher education institutions with the right to make internal academic decisions as the courts have minimal expertise in this area. In support, the AAUP quoted the *Keyishian* (1967) court's opinion that the Supreme Court "could not conceive of any circumstance wherein a state interest would justify infringement of rights in these fields" (p. 5) and the *Ewing* (1985) court's recognition that "academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself" (p. 7). The AAUP included the Supreme Court's discussion in *Grutter* (2006) that

> accorded a 'degree of deference' to educators' academic decisions, reiterating that given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. (p. 5)

They also reaffirmed their commitment to the "important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, again declaring that universities occupy a special niche in our constitutional tradition" (p. 8).

The AAUP reiterated that academic freedom is not an absolute right. They stated that, "professors are properly enjoined from introducing into their teaching controversial matter that has no relation to their subject" (p. 12). Even with these restrictions, the courts have recognized that, "to abridge [and] prevail over academic freedom, the interests of government must be strong and the extent of the intrusion carefully limited" (p. 13). The AAUP contended that the district court refused to examine Dr. Schrier's testimony "to determine the extent to which his statements were a reflection of his academic and professional views" (p. 14) but instead allowed the University of Colorado to curtail his academic freedom by not recognizing academic freedom as a special concern of the First Amendment. As such, the AAUP urged the federal court to join

> the Supreme Court and a long line of appellate court precedent, including this Court's own, [in reaffirming] the distinctive First Amendment right to academic freedom [and rejecting] the district court's holding that no right to academic freedom exists under the First Amendment. (p. 15)

U.S. Court of Appeals for the 10th Circuit. In October 2005, Schrier filed an appeal with the court of appeals contending the district court's decision should be

reversed based on three theories (*Schrier*, 2005). He claimed,

> (1) the application of a heightened standard to his preliminary injunction motion constitutes reversible error; (2) the conclusion that the University's interest in suppressing his speech outweighed his First Amendment rights was contrary to the balancing test established in [*Pickering* (1968)]; and (3) the court's *sua sponte* invocation of Eleventh Amendment immunity to bar his breach of contract claim was spurious and should be reversed. (p. 6)

Circuit Judge Seymour addressed each argument separately.

Preliminary injunction standard. The court reviewed the standard used by the district court to deny Schrier's preliminary injunction for abuse of discretion. To succeed, he must prove in succession that

> (1) [he or she] will suffer irreparable injury unless the injunction issues;
> (2) the threatened injury…outweighs whatever damage the proposed injunction may cause the opposing party;
> (3) the injunction, if issued, would not be adverse to the public interest; and
> (4) there is a substantial likelihood [of success] on the merits. (p. 7)

To reverse the district court's decision on this claim, "the state must show that the district court committed an error of law [caused] by applying the wrong standard…or committed clear error in its factual findings" (p. 7). Schrier conceded that the district court judge had articulated these factors to him.

As the purpose of the preliminary injunction is to preserve each party's position until a trial on the merits can be held, the court's decision must not require strict supervision by the state (*Schrier*, 2005). Such disfavored preliminary injunctions include "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits" (p. 8). The district court determined that Schrier's reinstatement would be disfavored as it would disturb the

status quo and require mandatory supervision. On appeal, Schrier contended that his reinstatement would preserve the status quo and be prohibitory not mandatory to implement which would not require him to "show that the [four preliminary injunction] factors [weighed] heavily and compellingly in his favor" (p. 9). The defendants argued, "reinstatement would place the court in position where it may have to provide supervision, and…be disruptive and detrimental to the essential functioning of University business" (p. 10).

First, Seymour determined that the district court erred in its determination that Schrier's reinstatement would disturb the status quo. Seymour stated that the point of status quo, "in the instant case, [is] the last peaceable uncontested status existing between the parties before the dispute developed" (p. 10). That point was on October 9, 2002 when Schrier held the department chair position. Seymour concluded that Schrier's reinstatement would maintain, not disrupt the status quo, thus reversing the Magistrate Judge's decision (*Schrier*, 2005).

Next, Seymour reviewed whether the preliminary injunction was prohibitive or mandatory. Schrier contended

> that the injunction he seeks is prohibitory rather than mandatory because it "requires the University to do nothing more than continue to do something it was already doing during the last uncontested period preceding the injunction, i.e., permitting Dr. Schrier to retain his Chairmanship until the litigation is resolved on the merits. (p. 11)

Seymour characterized the injunction for reinstatement as mandatory and disfavorable as it would require the university to act in a certain manner and place "the court in position where it may have to provide [ongoing] supervision" (p. 12). As a result, Seymour found

that "the magistrate judge's application of the heavily and compelling standard was, as it turns out, erroneous" (p. 13).

Lastly, Seymour noted that recent cases in the 10th Circuit had altered the application of injunctive relief. "The requirement that a movant requesting a disfavored injunction must make a showing that the traditional four factors weigh heavily and compellingly in his favor is no longer the law of the circuit" (p. 14). He determined that the district court's application of the invalid standard was an abuse of discretion even though the Magistrate Judge was unaware of the change. The court of appeal's task was to decide "whether the [district court's] application of the inappropriate standard warrant[ed] a remand" (p. 14). Seymour determined that "if…Schrier, regardless of the standard employed, failed to establish the required preliminary injunction factors, then the magistrate judge's erroneous application of the "heavily and compelling" standard is of no legal consequence" (p. 14). "Because the court determined [that] Schrier failed to establish irreparable injury or substantial likelihood of success on the merits, it deemed it unnecessary to address the preliminary injunction test's remaining prongs" (p. 15). Seymour continued with a review of Schrier's second claim, First Amendment rights violations.

First Amendment claims. Schrier claimed that the university "violated his First Amendment right of free speech and his rights to academic freedom by terminating his chairmanship in retaliation for public statements he made concerning the Health Sciences Center's move to Fitzsimons" (*Schrier*, 2005, p. 15). The district court ruled, and the court of appeals agreed, that Schrier did not establish a substantial likelihood

that his First Amendment claims would succeed or that he had suffered "irreparable injury sufficient to satisfy the preliminary injunction test" (p. 15).

To establish, a likelihood of success, Schrier had to prove that the employer violated his or her protected speech using the four-prong *Pickering* test. The test requires the court to

> [f]irst,…determine whether the employee's speech involves a matter of public concern. If so, [the court] then balance[s] the employee's interest in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Third, if the balance tips in favor of the employee, the employee then must show that the speech was a substantial factor or a motivating factor in the detrimental employment decision. Fourth, if the plaintiff establishes that speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech. (p. 16)

If Schrier's speech concerning the Fitzsimmons campus could not be characterized as speech of a public concern, the test fails and the court does not need to review the university's decision to discharge him.

To determine whether the speech was a matter of public concern, the *Connick* (1983) court extended the *Pickering* test and instructed that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record" (p. 16). Seymour determined that Schrier's speech concerning the use of public funds and the impact on patient care, education, and research resulting from the relocation of the campus, "affect[ed] the basic functions and missions of the university [and therefore] constitute[ed] speech on matters of public concern. Schrier satisfied the first prong of the *Pickering* analysis." (p. 18).

Schrier argued that the university needed to provide evidence of "actual disruption as a result of his speech in order to prevail in the second *Pickering* prong" (p. 19). The defendants contended

> that Dr. Schrier's speech regarding the move did not cease, but rather he spoke out against and did everything he could to undermine the move from the date the possibility of the move was first discussed until he was removed as department chair. (p. 21)

Testimony by the dean and 12 faculty members provided evidence that "Schrier's protected speech impaired harmony among coworkers, detrimentally impacted close working relationships within the school of medicine, impaired his performance as department chair, and interfered with the university's ability to implement the move to Fitzsimons" (p. 21). Seymour determine that it was reasonable to conclude that Schrier's "speech was having a detrimental impact on his performance and the university's operations" (p. 22).

The court of appeals also addressed Schrier's claim stating, "that [the] defendants violated his right to academic freedom, a right he contended is afforded special constitutional significance" (p. 22). The district court rejected his claim that the right to academic freedom is not

> a subset of the First Amendment, separate and distinct from the fundamental right of free speech [and refused] to endorse any suggestion that speech in an academic setting concerning the operations of a university enjoys greater constitutional protection than does political speech in the public forum. (pp. 22-23)

While the court of appeals recognized academic freedom as a special concern of the First Amendment, they agreed "with the magistrate judge that an independent right to academic freedom does not arise under the First Amendment without reference to the

attendant right of free expression" (p. 23). Seymour stated that "Schrier's argument impl[ied] that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees" (p. 23). Seymour declined "to construe the First Amendment in a manner that would promote such inequality among similarly situated citizens" (p. 23). He concluded that Schrier had "failed to meet his burden of demonstrating a substantial likelihood of success on his First Amendment claims under any standard applicable to preliminary injunctions" (p. 24)

Irreparable injury. The court of appeals reviewed Schrier's claim that the defendants violated his free speech and academic freedom rights, which constitute[ed] irreparable damage (*Schrier*, 2005) caused by his "loss of prestige, standing or reputation" (p. 25). Seymour cited *Heideman* (2001) which stated that, "[t]o constitute irreparable harm, an injury must be certain, great, actual and not theoretical" (p. 25) and that it "is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm" (p. 26). Seymour concluded that the district court "did not abuse its discretion in determining that, without the preliminary injunction, Schrier would not suffer irreparable harm" (p. 26) and "affirm[ed] the denial of Dr. Schrier's requested injunction as to his First Amendment claims" (p. 28).

Breach of contract claims. Finally, the court of appeals reviewed Schrier's contention *de novo* that the district court erred in dismissing his state law claim based on the university's right to Eleventh Amendment immunity as a state institution (*Schrier*, 2005). Schrier "request[ed] a remand for further consideration as to whether a preliminary injunction should be entered in connection with his breach of contract

claim" (p. 28). He argued and the court of appeals agreed that, based on the Supreme Court in *Lapides* (2002), the university waived its Eleventh Amendment right when it "voluntarily removed the instant action from state to federal court" (p. 28). Seymour agreed but denied the request to remand the contact claim because the "record establish[ed] that Dr. Schrier claim[ed] no injury resulting from the defendants' alleged breach of his employment contract that [was] distinct and severable from the injury he claim[ed] resulted from the university's alleged First Amendment violations" (p. 30). Seymour stated that, "in evaluating the magistrate judge's denial of a preliminary injunction with regard to Dr. Schrier's free speech and academic freedom claims, [the court] concluded that he suffered no irreparable injury" (p. 30). Based on Schrier's failure to establish irreparable damage, Seymour concluded that "Schrier could not prevail on his breach of contract claim in the preliminary injunction stage" (pp. 30-31) and affirmed the district court's order "denying Dr. Schrier's request for a preliminary injunction" (p. 31).

District Court of Colorado. On November 30, 2005, the district court reviewed the case pursuant to the university's motion for judgment concerning Schrier's request for a permanent injunction and their unopposed motion for extension of time to file a reply (*Schrier*, 2005). Previously, Judge Boland had denied Schrier's request for a preliminary injunction but left unresolved the request for the permanent injunction "pending resolution of certain factual disputes at trial under a 'clearly erroneous or contrary to law standard'" (p. 2). In turn, "the defendants immediately moved [the district court] to issue a recommendation as to the permanent injunction" (p. 1). The

court could award a permanent injunction if "the plaintiff [succeeded] on merit and only upon a showing of irreparable injury that would occur in the future" (p. 2). The court of appeals found that Schier could not succeed on merit or show irreparable injury, which resulted in Seymour denying Schrier's request for preliminary injunction. "Because the resolution of issues involving the preliminary injunction are not necessarily dispositive of the request for permanent injunction, the Court found that the lower court did not err in recommending that the resolution of the permanent injunction be deferred" (p. 2). As such, the district court denied the defendant's motions for judgment and extension of time.

On December 22, 2006, the district court filed an order of impending settlement. Judge Krieger was advised that the parties had reached a settlement of all claims. The judge ordered that the civil trial scheduled for January 22, 2007 would not be continued (*Schrier*, 2006). The terms of the settlement released both parties of all claims with the University of Colorado agreeing to "pay $300,000 to Schrier to partially reimburse him for attorney's fees [and] fund a sepsis-related acute renal failure research grant…for $250,000 a year for three years, beginning Jan. 1, 2007, and ending Dec. 31, 2009" (Glasscock, 2007, p. 1). "The settlement also required [the Dean of School of Medicine] to write a letter of apology (p. 1).

Analysis

The *Schrier* case began in the district court in October 2003 and ended in the court of appeals for the 10th Circuit on October 2005 (48 months). The analysis of the district court opinion, amicus brief, and court of appeals opinion identified 10 themes

with 12, 65, and 108 coded references respectively, for a total of 185 coded references. The themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 6.1. The themes are sorted by the *Totals by Theme* column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions and brief.

Table 6.1

Coded References by Theme and Court

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
First Amendment	0	27	16	43
Academic freedom	0	30	5	35
Preliminary, mandatory, permanent injunction	8	1	25	34
Irreparable damage-harm	4	0	14	18
Speech as a public employee	0	6	11	17
Disruption of university operations	0	1	11	12
Status quo	0	0	11	11
Matter of public concern	0	0	6	6
Reinstatement to the University	0	0	6	6
Immunity of public official	0	0	3	3
Totals by court or brief	12	65	108	185

To validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all of the opinions and brief. The usage of each word was reviewed and assigned to each of the above themes. The first query scanned word frequency across all the court opinions to identify the 50 most prevalent, three or more letter keywords. Each keyword's contextual usage in each court opinion was analyzed to determine whether the individual keyword was significant or required one or more adjacent words from the opinions to improve meaning. Themes with no applicable

keywords utilized the theme title or words within the title and were added to the list of keywords or phrases. The keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 30 remained relevant to the analysis and 20 were dropped due to irrelevance, vagueness, or lack specificity. Five of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. Twenty-five were combined into phrases consisting of two or more keywords. Each keyword and phrase was aligned with one of the 10 themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion. Each occurrence in each opinion was reviewed to eliminate redundancy and duplication of reference counts. Where redundancy was found, the query was refined and rerun. The query results were tabulated by court opinion and sorted in descending order by the *Totals by Theme* column. The results are provided in Table 6.2.

Table 6.2

Keywords and Phrases Totaled Theme and Court Cases or Brief and Sorted by Theme

Themes	Key Words	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Academic freedom	Academic freedom, *Keyishian*, protected speech, special concern	0	101	25	126
Preliminary, mandatory, permanent injunction	Preliminary injunction, mandatory injunction, permanent injunction, success on merit, injunctive relief, standard, disfavor*	20	4	69	93
First amendment	First amendment, right to free speech, constitutional	0	44	24	68
Irreparable damage-harm	Irreparable harm, irreparable injury	2	0	24	26
Public concern	Public concern, public interest, *Pickering*	0	0	23	23
Status quo	Status quo	0	0	22	22
Immunity of public official	Immunity, Eleventh Amendment	0	1	17	18
Speech as a public employee	Public employee, university professor, department chair	0	10	5	15
Disruption of university operations	Negative impact, interest of employer, university's interest, disrupt*	0	1	14	15
Reinstatement to the University	Reinstat*	0	0	9	9

The theme rankings in Table 6.1 and 6.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in the tables, the four most prevalent themes in descending order were First Amendment, academic freedom, preliminary, mandatory, permanent injunction, and irreparable damage-harm. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 6.3. The highest correlations were between

the First Amendment and academic freedom themes (0.96865) and the preliminary, mandatory, permanent injunction and irreparable damage-harm themes (0.83195).

Table 6.3

Pearson Correlation Coefficients for the Prevalent Themes

Theme	First Amendment	Academic Freedom	Preliminary, Mandatory, Permanent Injunction	Irreparable Damage-Harm
First Amendment	1.00000	0.96865	0.63081	0.63081
Academic freedom	0.96865	1.00000	0.55715	0.64768
Preliminary, mandatory, permanent injunction	0.63081	0.55715	1.00000	0.83195
Irreparable damage-harm	0.74335	0.64768	0.83195	1.00000

These themes are discussed based on the order provided in Table 6.4. Figure 6.1 presents a line graph of Table 6.4's coded references in order to illustrate the prevalence of each theme as it proceeded through the court system.

Table 6.4

Number of Coded References in Prevalent Themes by Court Opinion and Brief

Themes	District Court	Amicus Brief	Court of Appeals	Total
First Amendment	0	27	16	43
Academic Freedom	0	30	5	35
Preliminary, Mandatory, Permanent Injunction	8	1	25	34
Irreparable Damage-Harm	4	0	14	18
Totals by opinion and brief	12	58	60	130

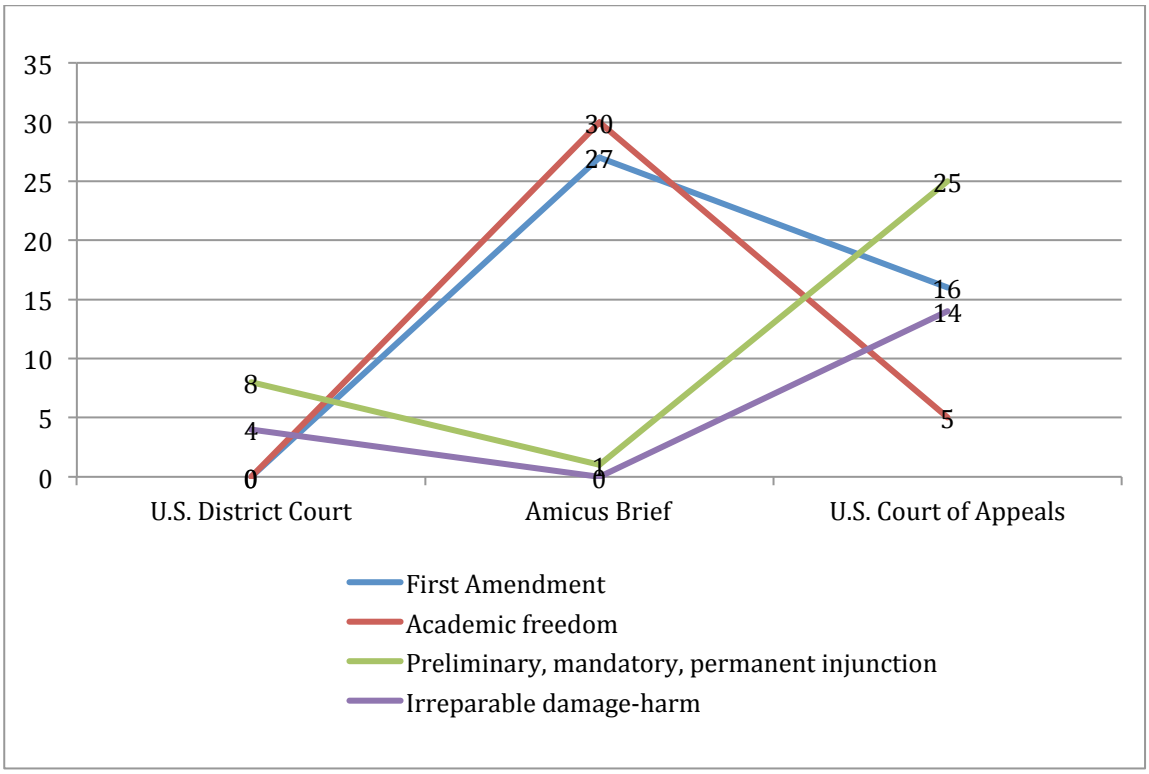


Figure 6.1. Four Most Prevalent Themes Based on Coded References

First Amendment. The dominant theme was First Amendment. The theme concentrated on Schrier's right to speak freely as a faculty member and administrator against the relocation of the university's medical college. Forty-three references were coded from the opinions and brief with 0, 27, and 16 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the academic freedom, speech as a public employee, irreparable damage, and disruption of university operations themes 29, 16, 6, and 6 times respectively. Table 6.5 provides the results of the query for each opinion and brief. The analysis includes examples from

each court opinion and brief showing how these four themes relate to the First Amendment theme.

Table 6.5

Matrix Coding of Four Prevalent Themes That Overlap the First Amendment Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Academic freedom	0	24	5	29
Speech as a public employee	0	9	7	16
Disruption of university operations	0	1	5	6
Preliminary, mandatory, permanent injunction	0	1	5	6

District court. The district court did not discuss Schrier's First Amendment rights, but did discuss Shrier's request to combine their hearing on his motions for preliminary and permanent injunctions. The court determined that Schrier could not succeed based on the merit of his case and the motion was denied.

Amicus brief. Amici focused on the court's continued support of academic freedom as a special concern of the First Amendment. They requested that the court of appeals "acknowledge Schrier's right to academic freedom [and urged them] to reject the district court's holding that no First Amendment right to academic freedom exists" (American Association of University Professors, 2003, p. 3). Amici reiterated the district court's statement that "academic freedom is not a subset of the First Amendment, separate and distinct from the fundamental right of free speech" (p. 4). Amici argued that the statement ignored holdings by the Supreme Court in *Sweezy* (1957), *Shelton* (1960), *Keyesian* (1967), *Bakke* (1978), *Ewing* (1985), and, most recently, *Grutter* (2006) which held "that given the important purpose of public education and the

expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition" (p. 3) and those made by this court of appeals. Amici acknowledged that academic freedom is not absolute. They argued that the district court

> did not examine Dr. Schrier's actual comments on the relocation of the University's medical school and hospital to determine the extent to which his statements were a reflection of his academic and professional views as opposed to a purely administrative refusal to execute a task properly assigned to him in his role as department chair. Instead, the court failed even to recognize that academic freedom is a special concern of the First Amendment. (p. 14)

In conclusion, Amici requested the court of appeals to reject the district court's "holding that no right to academic freedom exists under the First Amendment" (p. 14) irrespective of their decision concerning Schrier's injunctive relief.

Court of appeals. The court of appeals discussed Shrier's First Amendment rights in the context of his termination as department chair for his public speech against the relocation of the university's Health Sciences Center and the disruption caused to university operations by that speech. Judge Seymour used the 4-prong test in *Pickering* to determine whether Schrier's speech was protected as a matter of public concern (*Schrier*, 2005). He added that, "[if his] commentary regarding the Fitzsimons move cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for [his] discharge" (p. 16). Seymour agreed with the lower court's finding that his speech addressed a matter of public concern stating that "Schrier's speech addressing the use of public funds and regarding the objectives, purposes and mission of the University of Colorado and its medical school

[fell] well within the rubric of matters of public concern" (p. 18). As such, he satisfied the first prong of the *Pickering* test.

The second prong of the test required the court to weigh "the interest of a public employee in commenting on such matters [against] the interest of the employer in promoting the efficiency of its services" (p. 18). To satisfy the second prong, the university had to demonstrate actual disruption of operations as a result of Schrier's speech. Previous testimony showed that Schrier "spoke out against and did everything he could to undermine the move from the date the possibility of the move was first discussed until he was removed as department chair" (p. 20).

> The record [provided] evidence to support the determination that Dr. Schrier's protected speech impaired harmony among coworkers, detrimentally impacted close working relationships within the School of Medicine, impaired his performance as department chair, and interfered with the University's ability to implement the move to Fitzsimons. (p. 21)

Seymour stated that, "[u]nder these circumstances, it was reasonable for the University to conclude that…Schrier's speech, including the manner in which he expressed himself to others, was having a negative impact both on his performance and on the University's operations" (p. 22). As such, Schrier did not pass the second prong of the test.

Finally, Shrier claimed that the "university violated his right to academic freedom, a right he contended is afforded special constitutional significance" (p. 22). Seymour stated that, "the court expressly refused to endorse any suggestion that speech in an academic setting concerning the operations of a university enjoys greater constitutional protection than does political speech in the public forum" (pp. 22-23). He added that "Schrier's argument implie[d] that professors possess a special constitutional

right of academic freedom not enjoyed by other governmental employees" (p. 24) which creates an inequity among citizens. He held that Schrier had failed to provide substantial evidence that he could succeed on his request for a preliminary injunction and upheld the lower court decision on Schrier's First Amendment claims.

Academic freedom. The second most prevalent theme was academic freedom. As was true with the First Amendment theme, academic freedom concentrated on Schrier's right to speak freely as a faculty member and public employee on university matters. Thirty-five references were coded from the opinions and brief with 0, 30, and 5 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the academic freedom, irreparable damage, preliminary, mandatory, permanent injunction, and disruption of university operations themes 29, 3, 3, and 2 times respectively. Table 6.6 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the academic freedom theme.

Table 6.6

Matrix Coding of Four Prevalent Themes That Overlap the Academic Freedom Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
First Amendment	0	24	5	29
Speech as a public employee	0	10	2	12
Irreparable damage-harm	0	0	3	3
Preliminary, mandatory, permanent injunction	0	1	3	3

District court. The district court did not discuss Schrier's academic freedom, but did discuss Shrier's request to combine the hearing on his motions for preliminary and permanent injunctions.

Amicus brief. Amici focused on Schier's role as a faculty member and department chair to speak on issues related to his department. Amici's concern related specifically to the district court's determination that "Schrier's status as a university professor who serve[d] as a department chair entitled him to no rights distinctive from those of any other public employee" (American Association of University Professors, 2003, p. 3). Amici added that, because Schrier's comments were not examined "to determine the extent to which his statements reflected his academic views" (p. 4) as opposed to his administrative views as department chair, the district court held that he did "not have a First Amendment right to academic freedom" (p. 2). While "the right to academic freedom is not an absolute right any more than freedom of speech is itself an exclusive value prized literally above all else" (p. 11), amici stated that "the courts have still required the government to satisfy a high standard before it may abridge the academic freedom of a professor or university" (p. 13). As such, amici requested "that the Court reject the district court's holding that no right to academic freedom exists under the First Amendment" (p. 15) and uphold the court's recognition of academic freedom as a special concern of the First Amendment.

Court of appeals. The court of appeals discussed Schrier's academic freedom in relation to his public statements as a faculty member and department chair. Schrier agrued "that [the university] violated his right to academic freedom, a right he contended

is afforded 'special constitutional significance'" (p. 22) and retaliated by dismissing him from his department chair position. Judge Seymour restated the district court's refusal "to endorse any suggestion that speech in an academic setting concerning the operations of a university enjoys greater constitutional protection than…political speech in the public forum" (pp. 22-23). He agreed, stating that, "an independent right to academic freedom does not arise under the First Amendment without reference to the attendant right of free expression" (p. 23). He added that, "Schrier's argument implies that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees [and declined] to construe the First Amendment in a manner that would promote such inequality among similarly situated citizen" (p. 24). As such, he upheld the lower court's findings and rejected Schrier's request for a preliminary injunction due to his failure to demonstrate success on his First Amendment and academic freedom claim.

Preliminary, mandatory, permanent injunction. The third most prevalent theme was preliminary, mandatory, permanent injunction. Preliminary, mandatory, permanent injunction focused on Schrier's motion to be reinstated to his department chair position by court order temporarily until the court made a decision. Thirty-three references were coded from the opinions and brief with 8, 0, and 25 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the irreparable damage, status quo, First Amendment, and reinstatement to the University themes 8, 7, 5, and 4 times respectively. Table 6.7 provides the results of the query for

each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the preliminary, mandatory, permanent injunction theme.

Table 6.7

Matrix Coding of Four Prevalent Themes That Overlap the Preliminary, Mandatory, Permanent Injunction Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Irreparable Damage-Harm	2	0	6	8
Status Quo	0	0	7	7
First Amendment	0	0	5	5
Reinstatement to the University	0	0	4	4

District court. The district court reviewed Schrier's motion for preliminary injunctive relief. Judge Krieger instructed Judge Borland to consolidate Shrier's motion with the proceeding for a permanent injunction. Borland denied Shier's motion "citing the existence of issues of fact to be tried by a jury and stating that no further recommendation concerning [Shrier's] right to a permanent injunction is possible or appropriate" (*Schrier*, 2005, p. 1). Kreiger ordered that the proceeding be deferred pending consideration by a jury.

Amicus brief. Amici focused on academic freedom and the First Amendment. Amici discussed Shrier's injunctions in closing only to say that they left it to the trial courts to determine based on the factual record (American Association of University Professors, 2003) whether Schrier should be awarded an injunction.

Court of appeals. Judge Seymour stated that, "the limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held" (Schrier, 2005, p. 8). Seymour provided the four factors of the heavy and compelling standard that Shrier must satisfy in order to be successful.

> (1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury…outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits. (p. 7)

Because the preliminary injunction enforced by the court could be considered disfavorable, Seymour listed the three types as "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits" (p. 9) and described each.

The university argued that any injunction to reinstate Schrier would be disruptive and "place the court in a position where it may have to provide supervision" (p. 10). To answer the university's argument, Seymour had to determine whether "Schrier's requested reinstatement as Chair disturb[ed] the status quo and/or [was] mandatory, or merely preserve[d] the status quo and [was] prohibitory" (p. 10). He added that to determine "the status quo for preliminary injunctions, this court look[ed] to the reality of the existing status and relationship between the parties and not solely to the parties' legal rights" (p. 10). Seymour agreed with the lower court's conclusions and found (a) that Shrier's request sought "to preserve rather than disrupt the status quo" (p. 11), (b) that "reinstatement would place the court in position where it may have to provide

supervision" (p. 12), (c) that the "relief sought here was properly characterized as mandatory and, therefore, disfavored [and (d) that the lower court's] application of the heavily and compelling standard was, as it turns out, erroneous" (p. 13) as they are no longer recognized by the tenth circuit. As such, Seymour evaluated Shrier's request on its merits to determine whether the case should be remanded based his irreparable injury claims.

After review, Seymour determined that the claims would not succeed on their merits. To be successful, the irreparable harm or injury "must be certain, great, actual and not theoretical" (p. 25). Seymour stated that Schrier "failed to [provide evidence that] he suffered irreparable injury as a result of defendants' actions [and] to demonstrate the requisite likelihood of success on his free speech and academic freedom claims" (p. 24). Without the ability to find irreparable harm, Seymour affirmed the lower court's decision and denied Schrier's request for preliminary injunction.

Irreparable harm. The irreparable harm theme focused on Schrier's claim of injury resulting from his dismissal as a department chair and the effect it had on his reputation and credibility as a faculty member at the university. Eighteen references were coded from the opinions and brief with 4, 0, and 14 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the preliminary, mandatory, permanent injunction, First Amendment, and academic freedom themes 8, 6, and 3 times respectively. Table 6.8 provides the results of the query for

each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the academic freedom theme.

Table 6.8

Matrix Coding of Three Prevalent Themes That Overlap the Academic Freedom Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Preliminary, Mandatory, Permanent Injunction	2	0	6	8
First Amendment	0	0	6	6
Academic Freedom	0	0	3	3

District court. The district court reviewed Schrier's motion for preliminary injunctive relief in the context of the irreparable harm that he suffered. Judge Krieger found that Shrier "fail[ed] to show irreparable injury, in the sense that his removal as Chair during the time it will take to litigate this case would have an irreparable effect" (*Schrier*, 2005, p. 1). Kreiger ordered the proceeding to be deferred pending consideration by a jury.

Amicus brief. Amici did not discuss the irreparable harm Schrier claimed that he had suffered.

Court of appeals. The court of appeals reviewed Schrier's claim within the scope of his motion for preliminary injunction as injunctive relief. Schrier argued that "he suffered irreparable injury through the loss of academic prestige, standing, or reputation" (*Schrier*, 2005, p. 25) from the dismissal. Judge Seymour reiterated that the lower court "concluded Dr. Schrier failed to show he suffered irreparable injury as a result of [university's] actions" (p. 24). He added,

> to constitute irreparable harm, an injury must be certain, great, actual and not theoretical [and that] Schier must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. (pp. 25-26)

Seymour found that "Shrier made no attempt to apprise this court of any evidence in the record showing actual or significant risk of loss of prestige, academic reputation or professional opportunities" (p. 27). As such, Seymour concluded that Schrier had suffered no irreparable damage or injury.

Summary

Dr. Schrier was unsuccessful in receiving any type of injunctive relief for his First Amendment, breach of contract, or irreparable harm claims. In denying his claims, the court stated, "Schrier's argument implie[d] that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees" (Schrier, 2005, p. 13). As such, the court "declin[ed] to construe the First Amendment in a manner that would promote…inequality among similarly situated citizens (p. 13). As courts have been reluctant to interfere with academic and professional decisions, the ruling affirmed the university's right to control and discipline faculty for their speech when it is found to be disruptive to the university's operations. As faculty are expected to serve on committees and contribute to their department to gain tenure, the ruling could have the unanticipated effect of silencing discussion on university issues and chilling faculty speech.

On January 9, 2007, Schrier reached a settlement with prejudice with the University of Colorado. In the 2007, the university faculty newspaper, the *Silver and Gold Record*, reported the settlement as follows.

> Under the terms of the settlement, CU will pay $300,000 to Schrier to partially reimburse him for attorney's fees he has incurred. The School of Medicine also will fund a sepsis-related acute renal failure research grant, previously funded by the National Institutes of Health, for $250,000 a year for three years, beginning Jan. 1, 2007, and ending Dec. 31, 2009. Each year, $50,000 of those grant funds will go to support Schrier's salary. If Schrier's employment ends before the grant term is up, the school will continue to fund the grant as long as the division can find another faculty member willing to serve as the principal investigator and to continue the research at its existing level for the remainder of the three years, according to the settlement. (p. 1)
>
> Under the settlement agreement, Schrier's base salary compensation will be set at the standard base for incoming professors (currently approximately $94,000). However, his salary will be guaranteed by CU through Dec. 31, 2010, at $328,364 a year, according to the agreement. After that, Schrier's compensation will consist of his base pay, plus whatever additional moneys are appropriate, based on the level of grants and other funding Schrier generates. (p. 1)

The settlement agreement also required Krugman to issue a public letter of apology. The letter, dated Jan. 8 and signed by Krugman, stated that "the litigation between the University of Colorado and Dr. Robert Schrier surrounding his termination as chairman of the department of medicine has been settled" (p. 1). As of 2012, Dr. Robert Schrier is still a tenured faculty member at the School of Medicine in their new location in Aurora, Colorado.

Chapter Seven: *Hong v. Grant*

Background

The University of California at Irvine (UCI) is a public research university and academic institution. UCI is part of the University of California System and "receives public funding from the state of California to support its core mission of teaching, research and public service" (*Hong*, 2007, p. 3). The university system utilizes a shared governance structure that includes the Board of Regents, University President, and faculty "in a wide array of academic, administrative and personnel functions including departmental governance, the approval of course content and manner of instruction, appointment and promotion of faculty, and faculty and student discipline" (p. 3). Through the Academic Senate, the faculty advises the university on each of these functions and plays an essential role in the system's shared governance process.

Dr. Juan Hong was hired in 1987 and is currently a full professor in the Department of Chemical and Biochemical Engineering and Material Science at the University of California at Irvine (UCI). As a UCI faculty member, Hong was expected to participate in shared governance through "a peer-review process that evaluates faculty members seeking appointment and promotion within his department" (pp. 3-4). Hong stated

> that it is his obligation and responsibility as a faculty member to meaningfully review a candidate's file and provide candid and honest feedback [and] that, when voting against a candidate's appointment or promotion, he is expected to submit a brief memorandum of dissent describing the rationale behind his decision. (p. 4)

He contended that his participation in the shared governance process and his questioning of departmental decisions, which included faculty promotions, faculty merit increases, the staffing of sections with transient lecturers, and the extension "of an informal offer prior to full faculty approval" (p. 5) resulted in his merit increase being denied and his Constitutional free speech rights being violated.

In 2002, Hong participated in a peer review of Professor Ying Chang. "While Professor Chang's file was under review, Mr. Hong learned of a rumor that Professor Chang failed to disclose a financial conflict of interest when she first sought appointment at UCI in May 2001" (p. 4). Hong contended that Chang improperly acquired a grant from UC-SMART, a research grant program operated by the University of California at Berkeley, for $400,000. Hong believed that, because her "husband's company allegedly donated $200,000 in equipment, qualifying Professor Chang for a $200,000 matching grant from UC-SMART" (p. 4), the grant was not earned through accepted channels of competition. Hong provided this information to the review committee and asked for permission from the Chair of the Department of Chemical Engineering and Materials Science to do further investigation. After investigation, Hong asked the dean for the status of Chang's review and was told the she had resigned. Despite her resignation, Hong drafted a letter of dissent to Chang's initial review and asked that it be "included in Professor Chang's file and sought to have it forwarded to the office of the Dean of the School of Engineering" (p. 4), Dean Stanley Grant.

In March 2003, Hong questioned the department's use of lecturers to teach six of eight Materials department sections in the spring class schedule as opposed to using tenured faculty. He "was concerned that departmental resources were used to pay lecturers despite the availability of capable, salaried professors [and] felt it was the department's obligation to its students to staff courses with experienced faculty, rather than younger, transient lecturers" (p. 4). After investigation, Dean Grant reported that his office would be paying the lecturers salaries and that he would be reviewing the use of lecturers with each department in the future. Hong followed up with two more "requests for information about the lecturer assignments, citing abnormalities in staffing" (p. 5).

In October 2003, Hong participated in the review of "Professor Farghalli Mohammed's application for an accelerated merit increase" (p. 5). Hong contended that, "Professor Mohammed improperly included two non-UCI PhD students in his list of doctoral candidates under supervision and that [he] improperly listed two academic papers presented at conferences" (p. 5). He reported to the committee that Mohammed's "disingenuous presentation of academic credentials raised legitimate concerns about his integrity" (p. 5). Even though Hong voted against the application, Mohammed was approved and he in turn sent an email to departmental faculty thanking them for their support. In response, "Hong charged that Mr. Grant, Vice Provost for Academic Personnel, Herbert Killackey, and unnamed persons in the Dean's office improperly manipulated Professor Mohammed's review process and that further investigation was warranted" (p. 5).

Finally, in March 2004, Department Chair Grant announced "that Dr. Regina Ragan had accepted an informal offer of employment as an Assistant Professor, and that a full vote on her appointment would occur at an upcoming faculty meeting" (p. 5). Hong contended that the appointment prior to faculty approval violated "faculty right [in the] self-governance process to determine 'who can teach, who can do creative research, [and] who can serve in the community and university'" (p. 5). Hong charged Grant and the Engineering School Dean Nicolaos Alexopoulo had made an improper offer of employment to Ragan and "urged Executive Vice Chancellor Michael R. Gottfredsen to investigate" (p. 5).

In 2003, Hong was scheduled for a routine merit increase but requested a one-year deferral and applied in September 2004. His application listed no extramural research grants received, his peer-reviewed publications rated 'average' and 'minimal,' and he did not list any achievements under 'Professional Recognition and Activity,' 'Honors, Awards, Election,' 'Contracts, Grants or Fellowships,' 'Other Professional Service,' or under a number of other categories" (p. 5). In January 2005, the faculty committee denied his merit increase citing that "his research activities [were] not at the level commensurate with the rank of Full Professor, Step IV" (p. 5). "Hong's merit increase application was reviewed and evaluated by a number of UCI administrators including Mr. Alexopoulos, Associate Dean William Schmitendorf, Chair of the Academic Senate Counsel on Academic Personnel John Hemminger, and [Executive Vice Chancellor Michael R.] Gottfredsen" (pp. 5-6). In March 2005, Gottfredsen notified Alexopoulos of his issues with Hong's performance. He recommended that

Alexopoulos work with Hong to develop a remediation plan and that Hong's teaching load be increased "in light of his decreased scholarly contributions" (p. 6). In response to Grottfredsen's memorandum, Hong asserted that he was a victim of illegal retaliation for his criticisms of departmental practices.

After receiving no response from Grottfredsen, Hong filed a complaint with the university. He claimed

> whistleblower retaliation complaint with Assistant Executive Vice Chancellor Michael Arias on November 1, 2005. The complaint was ultimately rejected because [Hong's] merit action was initiated and completed in March 2005, well before the April 2005 whistleblower complaint on April 25, 2005. (p. 6)

Arias also determined that there was ample evidence to support Grottfedsen's recommendation. In response, Hong "filed the instant action pro se in the United States District Court for the Central District of California on February 8, 2006 alleging he was the victim of illegal retaliation for exercising his rights under the First Amendment to speak as a citizen on a matter of public concern" (p. 6).

The Defendants in the case are UCI administrators, Deans, and department heads. They include

> Stanley Grant, Chemical Engineering and Materials Department Chair; William Schmitendorf, Associate Dean of the School of Engineering; Nicolaos Alexopoulos, Dean of the School of Engineering; John Hemminger, Chair of the Academic Senate Council on Academic Personnel; Herbert P. Killackey, Vice Provost for Academic Personnel; and, Michael R. Gottfredsen, Provost and Executive Vice Chancellor of UCI. (p. 3)

They contended that Hong's statements were not protected speech under the First Amendment and moved for summary judgment on the grounds that Eleventh

Amendment provided immunity to public institutions, the Board of Regents and Dr. Grottfredsen and barred the awarding of damages to the Plaintiff (*Hong*, 2007).

Court Opinions and Brief

The *Hong* case began in the U.S. district court in September 2007 and ended in the U.S. Court of Appeals for the 9th Circuit in November 2010. Hong claimed that his First Amendment rights had been violated. In using the *Garcetti/Pickering* analysis, the court found that Hong spoke pursuant to his job responsibilities and that the university had a right to control his speech even if it was on "matter of public concern." The court stated,

> restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. (Hong, 2007, p. 7)

Adding,

> anything less than unfettered employer control over speech within an employee's official duties would displace managerial discretion for judicial supervision, requiring permanent judicial intervention in the conduct of governmental operations. (p. 7)

The district court granted the university's motion for summary judgment on the basis of immunity under the Eleventh Amendment. On appeal, the court affirmed the district court's decision and found that, because the university was "entitled to immunity from Hong's claims, [they need not proceed to the merits of [Hong's] First Amendment argument" (*Hong*, 2010, p. 2). Hong's appeal to the Supreme Court of California was denied thus ending the case.

District Court for the Central District of California. On February 8, 2006, Dr. Hong "filed the instant action *pro se* in the United States District Court for the Central District of California alleging he was the victim of illegal retaliation for exercising his rights under the First Amendment to speak as a citizen on a matter of public concern" (*Hong*, 2007, p. 5). The Defendants denied violating Dr. Hong's rights as they claimed that his speech was not protected and moved for summary judgment on the grounds of the Eleventh Amendment. U.S. District Judge Cormac J. Carney wrote the opinion of the court.

Judge Carney reviewed Hong's free speech rights based on the Supreme Court's recent decision in *Garcetti v. Ceballos*. In *Ceballos*, the Supreme Court held that the memoranda prepared by the supervising district attorney were "not protected by the First Amendment as they were prepared pursuant to his official job duties, not as a private citizen" (p. 6). The court stated,

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. (p. 6)

The court added,

> Allowing anything less than unfettered employer control over speech within an employee's official duties would "displace managerial discretion for judicial supervision," requiring "permanent judicial intervention in the conduct of governmental operations. (p. 6)

As such, Carney began his analysis stating that "[p]ublic employees do not enjoy the same First Amendment freedoms as do private citizens" (*Hong*, 2007, p. 6). Carney added that, "a government employer may impose speech restrictions upon its employees

that would be plainly unconstitutional if applied to the public at large" (p. 6). He asserted that the employer's right to restrict employee speech was based not only on the employee's job description, which defined official job duties but also "on any activity within an employee's uncontested employment responsibilities" (p. 6). These included any activities that enhanced or affected the employee's ability to perform his or her job. "Internal complaints about the employer's supervisory failures or workplace mismanagement [were] consistent with the type of activities the employee [was] professionally obligated to perform" (p. 6) and, therefore, part of his or her official job duties.

To decide whether his speech was protected, Carney reviewed each of Hong's four incidents "regarding faculty performance reviews, departmental staffing, and faculty hiring" (p. 8) to determine if his statements and communications were made "pursuant to his official duties [and responsibilities] as a UCI faculty member" (p. 7). As a faculty member, Carney stated that Hong's duties were "not limited to classroom instruction and professional research [but] include[d] a wide range of academic, administrative and personnel functions in accordance with UCI's self- governance principle" (p. 7) to which he was expected to provide feedback. In each of the four incidents, Carney found that Hong's statements "were made pursuant to his official job duties as a faculty member and, therefore, do deserve First Amendment protection" (p. 7). Carney determined that UCI's regulation of his speech as an employee did not deprive him of any free speech rights as a private citizen.

Finally, Carney reviewed Hong's comments in the context of whether they were made as a matter of public concern and protected by the First Amendment. Hong argued that his comments deserved protection because they "exposed government waste and mismanagement" (p. 7). Based on *Connick*, "[i]f employee statements cannot fairly be considered as relating to any matter of political, social or other concern to the community, the statements are not constitutionally protected speech" (p. 8). Carney determined that Hong's communications and statements were internal departmental complaints and not a matter of public concern or protected (H*ong*, 2007). While Hong argued that the inner workings of the university are a public interest, Carney contended that the university had not been implicated for matters of public concern such as malfeasance, corruption, or fraud. Absent these implications, Carney concluded that the federal courts were ill-equipped to handle the "endless judicial supervision of the decisions university administrators must make on a daily basis to ensure the efficient and effective management of their institution [as they] oversee these purely institutional decisions" (p. 9). The court added "that it was not qualified to second guess the wisdom of the university's practices and that it was required to allow university administrators wide latitude in managing the university's affairs in order to accomplish the university's educational and research mission" (p. 3).

Based on the *Garcetti* standard, the court found that Hong's communication and speech concerning hiring, tenure, promotion, and merit were made by a public employee as part of his official duties and not as a private citizen. The court also found that these communications with supervisors did not address a matter of public concern. The court

held that the Hong's speech was not protected and granted summary judgment to the Defendants.

Amicus brief. On March 17, 2008, the Thomas Jefferson Center for the Protection of Free expression and the American Association of University Professors (AAUP) filed an Amicus Curiae brief with the U.S. Court of Appeals for the Ninth Circuit. Amici argued that the district court "misconceived the nature of university scholarship and the roles and responsibilities of those who educate the vast majority of this nation's college students" (The Thomas Jefferson Center for the Protection of Free Expression, 2008, p. 4). Amici added that,

> [t]o equate faculty participation in matters of shared university governance with routine tasks that a conventional government employee "was employed to do," as District Court clearly did in this case, disregards the clear import of a half century of constitutional judgment recognizing First Amendment protection of academic freedom. (p. 4)

Amici concluded that using the *Garcetti* standard for university professors would "threaten [the] principles of academic freedom and free expression within the university" (p. 4). Amici requested that the district court's decision be reversed because (a) the district court misapplied *Garcetti* when they "classif[ied] classroom instruction and professional research as official duties" (p. 5) and (b) the district court disregarded and undermined the basic principles of academic freedom when they "misconceived the nature of shared governance and its relationship to academic freedom in denying First Amendment protection to [Hong's] speech" (p. 5). Amici continued with a discussion of each area of concern.

First, amici noted that the Supreme Court in *Garcetti* ruled that public employees no longer have First Amendment protections for statements made as part of their official job duties. Concerning faculty, Justice Kennedy's reservation and concerns in his dissenting opinion in *Garcetti* noted that, "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by the Court's customary employee speech jurisprudence" (p. 5). In response, the *Garcetti* majority stated that "we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching" (p. 6). Amici argued that the expression made by Hong concerning "the qualifications of two faculty members and the excessive reliance of part-time staff [were directly] related to academic scholarship and classroom instruction" (p. 6) and, therefore, fell completely within the scope of Kennedy's exception. As such, amici determined that the lower court failed "to recognize not only the unique nature of academic speech but also the connection between Hong's criticisms and the [UCI's] academic mission" (p. 7).

Amici added that the lower court ignored the premise upon which Kennedy's exception existed. The court stated, "that internal complaints and supervisory mismanagement are within an employee's official duties and not subject to First Amendment protections" (p. 8). Amici rebutted that *Garcetti's* "concept of official duties that a public employee has been employed to do has no bearing on the role of a state university teacher or scholar [which] implicate – indeed demand – a broad range of

discretion and autonomy that find no parallel elsewhere in the public service" (p. 9). In doing so, amici concluded that the court failed to recognize the unique nature of academia and the faculty's active role in university life.

Second, amici argued that the district court's ruling disregarded and undermined the basic principles of academic freedom by ignoring the judicial deference provided to faculty "on matters that are committed to professional judgment and expertise" (p. 16). Amici stated that

> [t]he speech of university professors merits a special degree of protection not only to facilitate uninhibited pursuit of truth and advancement of knowledge but equally to encourage scholars to speak candidly and fearlessly as they convey sometimes unwelcome can unsettling truths to government and citizens. (p. 16)
>
> If the District Court's standard were to apply broadly to academic freedom, it would provide First Amendment protection only for statements that fall so far beyond the speakers field of expertise as to be valueless to the general public, lawmakers, and others who depend upon scholarly guidance and counsel. (p. 18)

As such, amici asked the court of appeals to affirm the indivisibility of institutional governance and academic freedom and recognize that the lower court erred in equating classroom instruction and professional research with the official duties of a government employee.

Court of Appeals for the 9th Circuit. The court of appeals reviewed the district court's decision to grant summary judgment to the university. Judge O'Scannlain determined that, "[u]nder the Eleventh Amendment, the State of California and its official arms [UCI and its regents] are immune from suit [and] in their individual capacities are entitled to qualified immunity" (*Hong*, 2010, p. 2). Having ruled, O'Scannlain did not proceed to the merits of Hong's First Amendment claims. He "left

the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case" (p. 3) and affirmed the district court's decision to grant summary judgment to the university.

Analysis

The *Hong* case began in the district court in September 2007 and ended in the U.S. Court of Appeals for the 9th Circuit on November 2010 (39 months). The analysis of the district court opinion, amicus brief, and court of appeals opinion identified eight themes with 96, 119, and 6 coded references respectively for a total of 221 coded references. The themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 7.1. The themes are sorted by the total column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions and brief.

Table 7.1

Coded References by Theme and Court

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Expression pursuant to official job duties	38	46	0	84
Shared governance	14	18	0	32
First Amendment	11	18	1	30
Employer's right to control speech	15	11	0	26
Matter of public concern	9	8	0	17
Academic freedom	2	16	0	18
Immunity of public official	3	0	4	7
Retaliation	4	2	1	7
Totals by court or brief	96	119	6	221

To validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all the opinions and brief. The usage of each word was reviewed and assigned to each of the above themes. The first query scanned word frequency across all the court opinions to identify the 50 most prevalent, three or more letter keywords. Each keyword's contextual usage in each court opinion was analyzed to determine whether the individual keyword was significant or required one or more adjacent words from the opinions to improve meaning. Themes with no applicable keywords utilized the theme title or words within the title and were added to the list of keywords or phrases. The keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 18 remained relevant to the analysis and 32 were dropped due to irrelevance, vagueness, or lack of specificity. Six of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. Twelve were combined into phrases consisting of two of more keywords. Each keyword and phrase was aligned with one of the eight themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion. Each occurrence in each opinion was reviewed to eliminate redundancy and duplicity of reference counts. Where redundancy was found, the query was refined and rerun. The query results were tabulated by court opinion and sorted in

descending order by total number of references for each theme. The results are provided in Table 7.2.

Table 7.2

Keywords and Phrases Totaled Theme and Court Cases or Brief and Sorted by Theme

Themes	Key Words	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Expression pursuant to official duty and responsibilities	Pursuant, professional responsibilities, statements, official duties, job duties, internal	93	34	2	129
First Amendment	First Amendment, free speech, protected speech	40	24	3	67
Employer's right to control employee speech	Employer control, not protected, unprotected, *Ceballos, Connick*	36	9	1	46
Shared Governance	Governance	13	23	0	36
Immunity of public official	Immunity, eleventh, summary	13	3	15	31
Academic freedom	Academic freedom	0	30	0	30
Matter of public concern	Public concern, public interest, *Pickering*	11	4	0	15
Disruption of university operations	Negative impact, interest of employer, university's interest, disrupt*	0	1	14	15
Retaliation	Retaliat*, adverse	10	1	1	12

The theme rankings in Tables 7.1 and 7.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicate in the tables, the four most prevalent themes were: expression pursuant to official duty and responsibilities, First Amendment, employer's right to control employee speech, and shared governance. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 7.3. The highest correlations were between the expression pursuant to official job duties and shared

governance themes (0.93046) and the expression pursuant to official job duties and employer's right to control speech themes (0.88315).

Table 7.3

Pearson Correlation Coefficients for the Prevalent Themes

Theme	Expression pursuant to official job duties	Shared governance	First Amendment	Employer's right to control speech
Expression pursuant to official job duties	1.00000	0.93046	0.87320	0.88315
Shared governance	0.93046	1.00000	0.77851	0.74663
First Amendment	0.87320	0.77851	1.00000	0.86964
Employer's right to control speech	0.88315	0.74663	0.86964	1.00000

These themes are discussed based on the order provided in Table 7.4. Figure 7.1 presents a line graph of the coded references in Table 7.4, in order to illustrate each theme's prevalence as it proceeded through the court system.

Table 7.4

Number of Coded References in Prevalent Themes by Court Opinion and Brief

Themes	District Court	Amicus Brief	Court of Appeals	Totals by Theme
Expression pursuant to official job duties	38	46	0	84
Shared governance	14	18	0	32
First Amendment	11	18	1	30
Employer's right to control speech	15	11	0	26

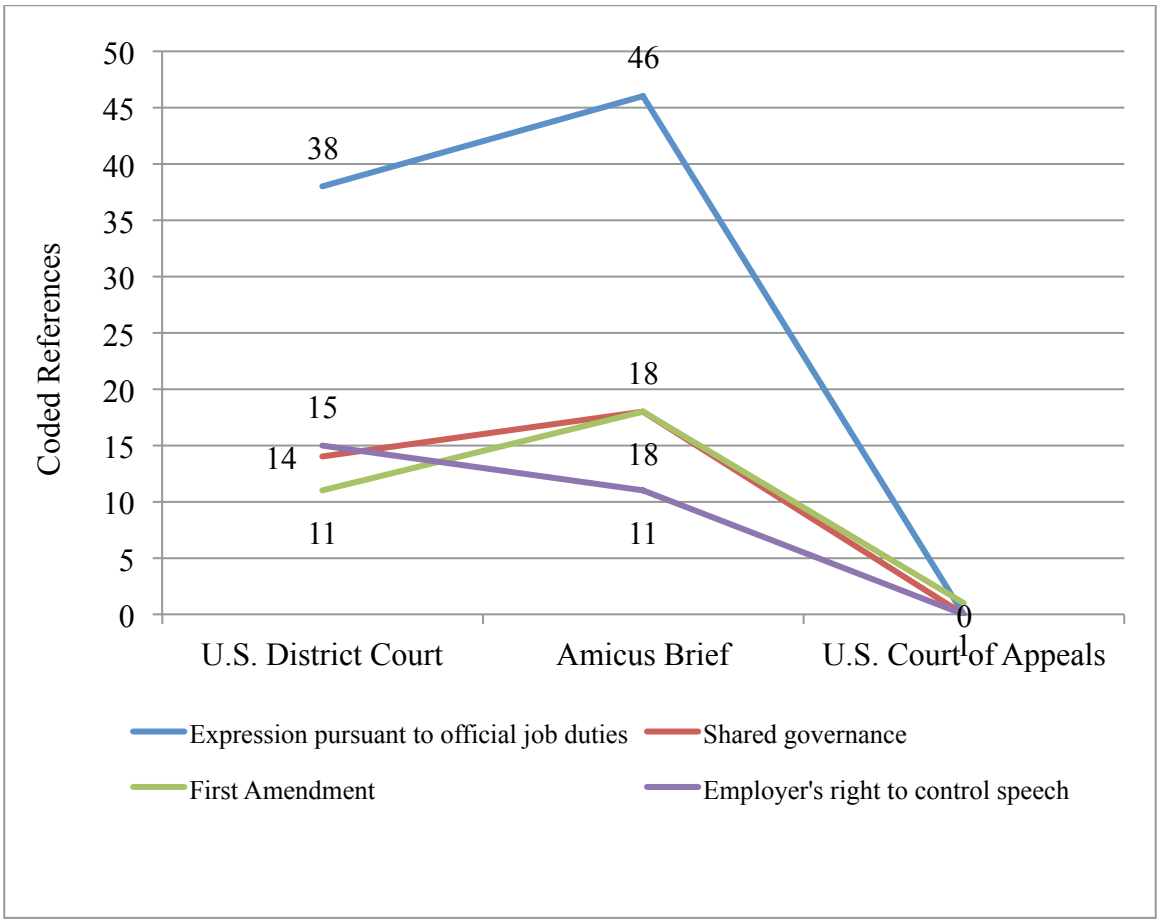


Figure 7.1. Four Most Prevalent Themes Based on Coded References

Expression pursuant to official job duties. The dominant theme was expression pursuant to official job duties, and concentrated on Hong's right to speak within his duties as a faculty member on issues related to faculty hiring, promotion, and staffing practices without fear of discipline by university administrators. Eighty-four references were coded from the opinions and brief with 38, 46, and 0 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the First Amendment, shared governance, employer's right to control speech,

and academic freedom themes 29, 24, 18, and 15 times respectively. Table 7.5 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the expression pursuant to official job duties theme.

Table 7.5

Matrix Coding of the Four Prevalent Themes That Overlap the Expression Pursuant to Official Job Duties Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by theme
First Amendment	12	17	0	29
Shared governance	8	16	0	24
Employer's right to control speech	9	9	0	18
Academic freedom	2	13	0	15

District court. The district court discussed Hong's expression within the context of the university's right to monitor and regulate public employee speech when it is part of his or her job responsibilities. Hong argued that,

> his First Amendment right to free speech was violated when he was denied a merit salary increase because of his critical statements regarding the hiring and promotion of other UCI professors as well as the use of lecturers to teach courses at the University. [The University denied] Hong's criticisms had anything to do with the decision to deny his merit salary increase and, in any event, contend that his criticisms were not protected speech under the First Amendment. (*Hong*, 20007, p. 3)

In response, District Judge Carney stated that "public employees do not enjoy the same First Amendment freedoms as do private citizens [and that] a government employer may impose speech restrictions upon its employees that would be plainly unconstitutional if applied to the public at large" (p. 6). He added that, "under the Supreme Court's recent

decision in [*Garcetti*], a public employer is extended unfettered discretion to regulate employee speech that it has commissioned or created" (p. 7) as part of their job duties or professional responsibilities "so long as its need for those restrictions is not outweighed by the interest of the employee in speaking as a private citizen on matters of public concern" (p. 6). To weigh Hong's right to unfettered speech, Carney applied the *Garcetti* standard to review Hong's statements to determine whether they were made within the context of his job responsibilities.

Carney started with a review of the policies and procedures and their expectations of faculty at the University of California System and UCI. He found that

> a faculty member's official duties are not limited to classroom instruction and professional research [which] include[d] a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle (providing for faculty involvement in departmental governance, the approval of course content and manner of instruction, appointment and promotion of faculty, and faculty and student discipline). (p. 8)

These findings provided a basis for reviewing each of Hong's four statements and his allegations of First Amendment violations and retaliation by the university for his speech as a faculty member.

After a review, Carney found that all of Hong's statements concerning peer review, department staffing, supervisor mismanagement, and process were made within the jurisdiction of his job responsibilities and not by a private citizen on a matter of public concern. Carney stated that,

> [the] [f]our statements, which Mr. Hong alleges served as the basis for UCI's illegal retaliation, were made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection. UCI is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities. Regulation of this professional

> speech does not strip Mr. Hong of any liberties he enjoys as a private citizen. (p. 11)

Carney added that the "[c]ourt is not qualified to second guess the wisdom of UCI's practices in this regard and it must allow University administrators wide latitude in managing its affairs if UCI is to accomplish its very important educational and research mission" (p. 3). As such, Carney rejected Hong's allegations and ruled in favor of the university.

Amicus brief. Amici reviewed Hong's speech as protected based on the Supreme Court's special concern for academic freedom under the First Amendment. They contended that "the [district court] fundamentally misconceived the nature of university scholarship and the roles and responsibilities of [faculty]" (The Thomas Jefferson Center for the Protection of Free Expression, 2009, p. 4) and added that "any attempt to apply the *Garcetti* standard to state university professors…would severely threaten basic principles of academic freedom and free expression within the university community" (p. 4). Amici discussed the court's application of *Garcetti* and its effect on academic freedom and shared governance at public universities.

Amici reviewed the Supreme Court's cautions in applying *Garcetti* in an academic environment. They reminded the Court that the *Garcetti* "majority…recognized that we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching" (p. 6). Amici argued that Hong's statements reflected both his responsibilities as a UCI faculty member and his academic experience and expertise as a scholar. Amici stated that

> the court erred, in failing to recognize not only the unique nature of academic speech, but also the connection between the criticism for which Professor Hong was punished and the academic mission. The court's assumption that "a faculty member's official duties" include "classroom instruction and professional research" for the purpose of post-*Garcetti* First Amendment protection (or lack thereof) is simply incorrect in light of Justice Kennedy's reservation of the issue of 'speech related to scholarship or teaching' [and UCI policy]. (p. 7)

Based on these reservations, amici concluded that "*Garcetti*'s core concept of official responsibilities that a public employee has been employed to do simply has no bearing upon the role of a state university teacher and scholar" (p. 9). Amici added,

> [i]f every such activity were deemed an unprotected "official duty" simply because it fell within the very broad range of professorial prerogatives, the scope of *Garcetti*'s curb on First Amendment protection would be far broader for professors than even for the general run of government workers. (p. 13)

It would mean that the courts "would provide First Amendment protection only for statements that fall so far beyond the speaker's field of expertise as to be valueless to the general public, lawmakers, and others who depend upon scholarly guidance and counsel" (p. 18). As such, amici urged the court of appeals to "recognize that the District Court…erred by suggesting that classroom instruction and professional research are within the category of official duties left unprotected by the First Amendment after the [*Garcetti*] decision" (p. 19) and reverse the judgment of the lower court.

Court of appeals. The court of appeals did not discuss Hong's expression pursuant to his job duties. Judges O'Scannlain, Gould, and Ikuta ruled only on the University's motion for summary judgment.

Shared Governance. The shared governance theme focused on Hong's responsibilities as a University of California faculty member to be directly involved in the governance and decision making process of the university and his department.

Thirty-two references were coded from the opinions and brief with 14, 18, and 0 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, academic freedom, and First Amendment themes 24, 8, and 7 times respectively. Table 7.6 provides the results of the query for each opinion and brief. The analysis includes examples from the opinions and brief showing how these four themes relate to the shared governance theme.

Table 7.6

Matrix Coding of the Three Prevalent Themes That Overlap the Shared Governance Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by theme
Expression pursuant to official job duties	8	16	0	24
Academic Freedom	1	7	0	8
First Amendment	2	5	0	7

District court. The district court reviewed and discussed Hong's role and use of the university's shared governance system to critique hiring, promotion, and staffing within his department. Hong believed that it was the faculty's

> right [in the] self governance process to determine who can teach, who can do creative research, [and] who can serve in the community and university [and that p]articipation in the governance of the University including appointment and promotion of faculty [was the] professional right of faculty (p. 5).

Judge Carney agreed, stating that based on UCI's self- governance principle, the university "allow[ed] for expansive faculty involvement in the interworkings of the University, and it [was] therefore the professional responsibility of the faculty to

exercise that authority" (p. 8). As Hong was expected to be involved in the operation of the university and decision of his department via the governance structure, Carney ruled that his participation was part of his job duties as a faculty member and, as determined in *Garcetti*, Hong's speech was not protected.

Amicus brief. Amici discussed shared governance as a fundamental responsibility of all UCI faculty, which the district court's decision ignored. In applying *Garcetti*, Amici argued that the district court "erred in classifying classroom instruction and professional research as official duties…but also…misconceived the nature of shared governance and its relationship to academic freedom" (The Thomas Jefferson Center for the Protection of Free Expression, 2009, p. 5). Citing Justice Kennedy's reservation in *Garcetti* to the issue of speech related to scholarship or teaching, amici stated that the district court's

> extension of that erroneous reasoning to speech relating to shared governance - that is, to the "feedback, advice and criticism about his department's administration and operation [provided] from his perspective as a tenured, experienced professor–is, therefore, erroneous as well." (p. 8)

They added that "a faculty member is entitled to speak publicly about and to take active part in virtually every facet of university life, and that crucial entitlement is vitally connected to the faculty member's exercise of academic freedom" (p. 12), especially "at a university that values participation in [the] shared governance of the campus" (p. 14). Amici concluded that "it is impossible to decouple speech related to shared governance from speech directly related to the core academic mission that was set aside by the Court in *Garcetti*" (p. 17) and, therefore, "illustrates…the degree to which that ruling undermines and disserves the central values of academic freedom" (p. 18). As such,

amici asked the court of appeals "to affirm the indivisibility of speech related to institutional governance and academic freedom" (p. 19) and reverse the district court's ruling on Hong's unprotected speech.

Court of appeals. The court of appeals did not discuss Hong's responsibility in the university's shared governance. Judges O'Scannlain, Gould, and Ikuta ruled only on the university's motion for summary judgment.

First Amendment. The First Amendment theme focused on Hong's right to protected free speech as a faculty member and public employee. Thirty references were coded from the opinions and brief with 12, 17, and 1 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, employer's right to control speech, shared governance, matter of public concern, and academic freedom themes 28, 12, 7, 6, and 6 times respectively. Table 7.7 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the First Amendment theme.

Table 7.7

Matrix Coding of the Three Prevalent Themes That Overlap the First Amendment Theme

Themes	District Court	Amicus Brief	Court of Appeals	Totals by theme
Expression pursuant to official job duties	12	17	0	29
Employer's right to control speech	8	4	0	12
Shared governance	2	5	0	7
Matter of public concern	3	3	0	6
Academic freedom	0	6	0	6

District court. As discussed earlier, the district court stated, from *Connick,* that "public employees do not enjoy the same First Amendment freedoms as do private citizens [and, from *Pickering,* that] a government employer may impose speech restrictions upon its employees that would be plainly unconstitutional if applied to the public at large" (*Hong*, 2007, p. 6). After review of Hong's statements, Judge Carney determined that he did "not deserve First Amendment protection [and that] UCI [was] entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities" (p. 9). Carney added,

> the Court has great difficulty in viewing Mr. Hong's comments as a matter of such public concern that protection under the First Amendment is deserved [and that his statements were] more properly characterized as internal administrative disputes which have little or no relevance to the community as a whole. (p. 9)

As such, Carney denied Hong's statements of protection under the First Amendment.

Amicus brief. Amici reiterated the district court's error in applying *Garcetti* to Hong's statements. Amici argued that the district court's

> assumption that "a faculty member's official duties" include "classroom instruction and professional research" for the purpose of post-*Garcetti* First Amendment protection (or lack thereof) is simply incorrect in light of Justice

> Kennedy's reservation of the issue of "speech related to scholarship or teaching." Thus, the very premise for the District Court's denial of First Amendment protection to Professor Hong's speech relating to other academic functions was fatally flawed. (The Thomas Jefferson Center for the Protection of Free Expression, 2009, p. 7)

Amici stated,

> [c]entral to the District Court's rejection of [Hong's] First Amendment claims was the premise that any activity in which [he] was *entitled* to participate as a faculty member became, for that reason alone, one of his "official *duties*," about which he was accordingly not free to speak with impunity–no matter how potentially beneficial to public interest might be his unwelcome comments. Such an equation gravely misconceives the very nature of a professor's role in the academic community. (p. 12)

Adding,

> [i]f every such activity were deemed an unprotected "official duty" simply because it fell within the very broad range of professorial prerogatives, the scope of *Garcetti*'s curb on First Amendment protection would be far broader for professors than even for the general run of government workers. (p. 13)
>
> If the District Court's standard were to apply broadly to academic speech, it would provide First Amendment protection only for statements that fall so far beyond the speaker's field of expertise as to be valueless to the general public, lawmakers, and others who depend upon scholarly guidance and counsel. (p. 18)

Amici urged the court of appeals to reverse the district court's ruling.

Court of appeals. The court of appeals did not discuss Hong's First Amendment rights. As occurred in *Garcetti*, Judges O'Scannlain, Gould, and Ikuta left "the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case" (p. 3). They ruled only on the University's motion for summary judgment.

Employer's right to control speech. The employer's right to control speech theme focused on the university's right to control Hong's speech when his job duties

coincide with his role as a faculty member and public employee. Twenty-six references were coded from the opinions and brief with 15, 11, and 0 in the district court, amicus brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, First Amendment, academic freedom, matter of public concern, and academic freedom themes 19, 12, 7, 3, and 3 times respectively. Table 7.8 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the employer's right to control speech theme.

Table 7.8

Matrix Coding of the Three Prevalent Themes That Overlap the Employer's Right to Control Speech

Themes	District Court	Amicus Brief	Court of Appeals	Totals by theme
Expression pursuant to official job duties	10	9	0	19
First Amendment	8	4	0	12
Academic Freedom	1	2	0	3
Matter of Public Concern	3	0	0	3

District court. The district court discussed the fact that "a government employer may impose speech restrictions upon its employees "that would be plainly unconstitutional if applied to the public at large" (*Hong*, 2010, p. 6). Citing *Connick*, Judge Carney stated,

> [the] government may set restrictions upon employee speech so long as its need for those restrictions is not outweighed by the interest of the employee in speaking as a private citizen on matters of public concern. This balance is struck

> under the common sense realization that government offices could not function if every employment decision became a constitutional matter. (p. 6)

Citing *Garcetti*, Carney added,

> restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. (p. 7)

He continued, "allowing anything less than unfettered employer control over speech within an employee's official duties would displace managerial discretion for judicial supervision, requiring permanent judicial intervention in the conduct of governmental operations" (p. 7). He determined that all of Hong's statements were commissioned by the university as part of his job duties and that the university had the right to control his speech.

Amicus brief. Amici discussed the district court's application of *Garcetti* to *Hong*. Amici cited "*Garcetti*'s central premise is that, for the general run of public employees, a distinction of constitutional stature can be drawn between statements that are made 'as a citizen' and those that are uttered 'pursuant to official responsibilities'" (The Thomas Jefferson Center for the Protection of Free Expression, 2009, p. 4). They added that "*Garcetti*'s core concept of 'official responsibilities' that a public employee has been "employed to do" simply has no bearing upon the role of a state university teacher and scholar" (p. 9) and that the "actual duties of state university professors implicate…a broad range of discretion and autonomy that find no parallel elsewhere in the public service" (p. 9). Amici argued,

> public universities…routinely encourage faculty members to critique institutional operations in a myriad of ways, though the final decision on most issues rests with an administrator, the Board of Regents, or a similar decision-maker. [Therefore, it] would be particularly unproductive, and counter to the notion of a functioning, collegial academic workplace, for the university then to be able to punish faculty when they perform as invited. (p. 15)

Based on Justice Kennedy's reservation for "expression related to academic scholarship or classroom instruction" (p. 5), amici urged the court of appeals to reconsider the district court's application of *Garcetti* to *Hong* and to reverse the judgment.

Court of appeals. The court of appeals did not discuss the University's right to control Hong's speech. Judges O'Scannlain, Gould, and Ikuta ruled only on the University's motion for summary judgment.

Summary

In affirming the district court's decision to grant university summary judgment, the court of appeals also affirmed the university's right to control public employee speech that is made pursuant to their official job responsibilities. With *Hong*, faculty speech at public universities whether it is inside or outside of the classroom or on governance committees can be considered a work that is "commission and created" (p. 6) by the university which can be controlled and regulated by the employer. The district court recognized that an "employee's official duties are construed broadly to include those activities that an employee undertakes in a professional capacity to further the employer's objectives" (p. 7). As courts have done previously, the district court added their reluctance to being involved in the control of public employee speech citing *Garcetti* that "[a]llowing anything less than unfettered employer control over speech within an employee's official duties would 'displace managerial discretion for judicial

supervision,' requiring 'permanent judicial intervention in the conduct of governmental operations" (p. 7). These statements not only equated the job duties of public university faculty with those of a public employee, they also created, as amici stated,

> a directly inverse correlation between the potential value to society of a scholar's public statements and the degree of constitutional protection for those statements [which] cannot be what Justice Kennedy intended when he expressly recognized in *Garcetti* the uniqueness of faculty speech and of the university community. (*Schrier*, 2008, p. 19)

In response, the court of appeals left "the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case" (*Schrier*, 2010, p. 3) and did not reverse the district court's decision to grant the university summary judgment and immunity from lawsuit. As of July 2012, Dr. Juan Hong remains a professor at the University of California Irvine but has not been reappointed as department chair.

Chapter Eight: *Churchill v. The University of Colorado at Boulder*

Background

Soon after September 11, 2001, Ward Churchill, chair of the Ethics Studies department and a professor in American Indian studies at the University of Colorado at Boulder (UC), published an essay titled *On the Justice of Roosting Chickens*, on an obscure website (AAUP, December 2010). Churchill argued that U.S. foreign policy had provoked the attacks on the World Trade Center and suggested that the people working in the financial services companies in the Twin Towers were complicit. He labeled these people as a "technocratic corps at the very heart of America's global financial empire" and called them "little Eichmanns" (2005, "Meet the Terrorists", para. 7), a reference to the mastermind of the holocaust, Adolf Eichmann. He contended that, "the hijackers were not cowards as they had manifested the courage of their convictions" (para. 8). Just prior to his lecture at Hamilton College in February 3, 2005, a student found the essay and published it in the student newspaper. The essay was subsequently published five days later by the *Syracuse Post-Standard* newspaper (Schrecker, 2010). The controversy soon spread outside of Hamilton when Fox news talk show host, Bill O'Reilly, "claim[ed] that Churchill should be arrested for sedition and calling on all of his viewers to demand that Hamilton cancel Churchill's appearance" (p. 3). The speed of the media provoked an enormous amount of attention at Hamilton College, which resulted in President Joan Hinde Stewart cancelling Churchill's lecture for safety and security reasons (Schrecker, 2010).

On February 1, 2005, Colorado Governor Bill Owens wrote a letter to the University demanding Churchill's resignation. The letter was followed by a unanimous resolution in the Colorado legislature demanding that Churchill be fired. In response, Churchill relinquished his position as chair of the Ethics Studies department but not his tenured faculty position (Schrecker, 2010). University of Colorado at Boulder President Elizabeth Hoffman "invoked the McCarty era as she cited the threat to academic freedom that Churchill's case might pose" (p. 4). Three days later Governor Owens and University of Colorado Board of Regents forced Hoffman to resign for refusal to fire Churchill and replaced her with former Colorado Senator Hank Brown who was an early supporter of the ACTA and an entrenched member of the GOP conservative establishment (Schrecker, 2010).

On February 5, 2003, the Board of Regents convened a special meeting to discuss Churchill. The review was conducted in order answer two question.

> (1) Does Professor Churchill's conduct, including his speech, provide any grounds for dismissal for cause…? (2) If so, is this conduct or speech protected by the First Amendment against University action? (p. 10)

After a month-long investigation Dr. Philip DiStefano, UC Chancellor, reported to the Board that Churchill's comments were repugnant but protected by the First Amendment. The report concluded that

> [a]llegations have been made that Professor Churchill has engaged in research misconduct; specifically, that he has engaged in plagiarism, misuse of others' work, falsification and fabrication of authority.

> These allegations have sufficient merit to warrant referral to the [UC] at Boulder Standing Committee on Research Misconduct for further inquiry in accordance with prescribed procedures…If the Committee determines that Professor Churchill engaged in research misconduct, the Committee is to make recommendations regarding dismissal or other disciplinary action.
>
> Also referred to the Committee is the question of whether Churchill committed research misconduct by misrepresenting himself to be American Indian to gain credibility, authority, and an audience by using an Indian voice for his scholarly writings and speeches. (University of Colorado at Boulder, n.d., **"**Summary of the Chancellor's Review and Decisions," para. 3-5)

In June 2006, the five-member Standing Committee on Research Misconduct issued their report on the seven allegations of academic misconduct against Professor Ward Churchill that were presented to them. The committee unanimously found that Churchill had falsified, fabricated, plagiarized, and failed to comply with established standards regarding author names on publications, and had seriously deviated from accepted practices in reporting his results (University of Colorado at Boulder, 2006, p. 94). The committee acknowledged "the role [that] some media outlets and certain public figures [have had] in stirring up public animosity toward Churchill and the University of Colorado" (p. 100), that "[m]embers of the press have acquired considerable power to advance or harm scholarly reputations" and that "changes in communication can have particular impact when an accusation of academic wrongdoing becomes a matter of public interest" (p. 101). The committee condemned the University for mismanaging "its affairs in a way that lent support to its critics [as well as] some elected officials for exploiting the legitimate concerns of their constituents and [transforming] them into an agenda that weakens higher education in Colorado" (p. 100). The committee, however,

was split as to what action was appropriate with two committee members recommending suspension for two years, two recommending suspension for five years and one recommending immediate dismissal (p. 104). "Soon after [the report was filed], Chancellor DiStefano issued Churchill a Notice of Intent to Dismiss which [Churchill] immediately appealed to the Privilege and Tenure Committee of the faculty Senate" (AAUP, 2010, *Ward Churchill v. The University of Colorado, para. 2)*.

In May 2006, one month prior to the committee's final report, the American Council of Trustees and Alumni (ACTA) published the report "How Many Ward Churchills?" citing examples of curricula, courses, and syllabi at 47 colleges and universities where, ACTA stated, "professors are using their classrooms to push political agendas in the name of teaching students to think critically" (p. 3) and "to explore how widespread the "Ward Churchill phenomenon really is" (p. 2). The report incorporated American Association of University Professors (AAUP), American Council on Education (ACE), and American Association Colleges and Universities principles and statements to compare accepted academic practices with the academy's politically correct teaching methods and to emphasis the rights of professors over those of students (p. 35). ACTA concluded the report with a call to elected official, trustees, administrators, alumni, parents, students, and citizens to hold higher educational institutions accountable for their hiring of radical faculty and their abuses of academic freedom privileges (p. 37). What affect the report had on Churchill's case is unknown but UC Boulder courses were included in their report and characterized as "staples of the

politically progressive academy" (p. 22) and "how-to guides for budding activists" (p. 13).

Soon after the Standing Committee on Research Misconduct's report was issued, Churchill appealed to the Privilege and Tenure Committee for dismissal of all charges against him on two procedural grounds. First, Churchill questioned the "whole investigation's legitimacy as it was a selective enforcement precipitated by his constitutionally protected political writing about 9/11 and [second], the investigating committee's behavior as it had violated his right to due process" (Schrecker, 2010, p. 17). On April 11, 2007, the committee concluded that Churchill had engaged in academic misconduct with three members recommending suspension for 2 years and two for dismissal. The committee recognized that if it had not been "for his exercise of his First Amendment rights, Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent for dismissal presently at issue" (p. 17). With ambivalence, the committee concluded the faculty's role in the investigation and turned it over to the Board of Regents and President Hank Brown, the new UC Boulder president, for final action.

Brown wasted no time in recommending dismissal to the Board of Regents. He argued that "the University cannot disregard allegations of serious research misconduct…simply because the allegations were made against a professor whose comments have attracted a high degree of public attention" (p. 19). In a letter dated March 29, 2007, he wrote,

> the prohibition against research misconduct extends to all faculty members, irrespective of their academic disciplines or political views. Were it otherwise, the University could not maintain the integrity of the scholarly enterprise. Brown concluded his letter to the Regents by saying that Churchill deserved to be fired because the research misconduct charges on which he was found guilty were "severe," "deliberate" and that "Professor Churchill's misconduct seriously impacts the University's academic reputation and the reputations of its faculty". (Jaschik, 2007, para. 7)

At their July 24, 2007 meeting, the Board voted eight to one to accept the president's recommendation and dismiss Churchill from his tenured faculty position for engaging "in repeated and deliberate misconduct that fell below standards of professional integrity" (p. 19).

In all official statements and press releases, the president and the Regents reiterated that Churchill had every right as a citizen to his "controversial political views" and that they were not punishing him for his "little Eichmanns" statement. They emphasized that their "decisions were guided by the findings of three faculty committees made up of more than 20 tenured faculty members from [UC] and other universities which unanimously determined that Professor Churchill had engaged in acts of research misconduct" (Schrecker, 2010, p. 19). The statements not only emphasized the use of due process to remove a tenured faculty member and the right of the institution to academic freedom, but also provided distance to the president and the Board from the issue of Churchill's right to extramural speech as an academic. Soon after his termination, Churchill filed a lawsuit against the University of Colorado at Boulder and the Board of Regents.

Court Opinions and Briefs

The *Churchill* case was filed in District Court of the City and County of Denver, Colorado in July 2007. The Supreme Court of Colorado agreed to hear his case in June 2012 and, as of August 2012, Churchill awaits their decision. The district trial jury found that the University would not have been investigated Churchill if he had not exercised his First Amendment speech rights by publishing the essay. They awarded Churchill a nominal amount of one dollar and returned the case to the district trial court for consideration of his request for reinstatement. Presiding district court Judge Naves denied his request and moved to the University's motion of quasi-judicial immunity. Naves granted the motion "because the [investigation and review] process…shared enough of the features of the traditional judicial process that, for purposes of immunity, it was functionally equivalent to the judicial process" (*Churchill*, 2010, p. 8). On appeal, the court affirmed the trial court's findings and found that the University's investigation did not violate Churchill's First Amendment rights or constitute an adverse employment action. A detailed review of each opinion and brief are discussed.

District Court of the City and County of Denver. In March 2009, Ward Churchill filed a lawsuit against the University of Colorado at Boulder and the Board of Regents for violating his First Amendment rights and asked for relief for terminating him from his professorship. Churchill requested "the Court [to] order his reinstatement of employment to his former position of fully tenured professor at the University of Colorado, and to provide such further equitable relief as is necessary to vindicate his rights under the First Amendment to the United States Constitution" (p. 1). In the

interests of time and costs, both parties agreed that the University would waive its right to claim Eleventh Amendment immunity in exchange for the right "to assert any defenses that would be available to individual Regents" (p. 4) after the jury considered Churchill's First Amendment claims. The court proceeded with the first phase of the jury trial.

Motion of judgment as a matter of law. On April 2, 2009, after a 4-week trial, the jury found that Churchill's First Amendment rights had been violated (Schrecker, 2010). Specifically, the jury held that

> [his] protected speech–his writings about September 11–had been a substantial and motivating factor for the Board of Regent's decision to dismiss him from his tenured position and that the Regents would not have voted to dismiss him in absence of his protected speech. (AAUP, 2010, *Ward Churchill v. The University of Colorado*, para. 4)

The jury "awarded Professor Churchill economic damages in the amount of one dollar, and noneconomic damages in the amount of zero (0) dollars (p. 27) recognizing his claim that "this wasn't about money" (Schrecker, 2010, p. 20) but rather his reinstatement to the University. But, the trial court ruled

> against reinstatement because it would undermine the University's ability to define the standards of scholarship and concluded that on the basis of the evidence adduced at trial regarding Churchill's hostility toward the University, reinstatement was not likely to result in a "productive and amicable working relationship" between the University and Churchill. (*Churchill*, 2010, p. 11)

As specified in the trial management order, the court moved to the next phase of the process, the defendant's motion of quasi-judicial immunity on Churchill's second claim for relief.

On April 17, 2009, Naves reviewed the defendant's motion for quasi-judicial immunity. As stated in *Butz* (1978), this immunity is relevant "when a governmental body [such as the Regents] applies preexisting legal standards or policy considerations to present or past facts presented to the governmental body" (*Churchill*, 2009, p. 14), "applies when proceedings are conducted by a trier of facts insulated by political influence" (p. 15), "appropriate where a party is entitled to present his case by oral or documentary evidence" (p. 16), and "appropriate where the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision" (p. 16). As such, "the parties are entitled to know the findings and conclusions on all issues of fact, law or discretion presented on the record [and] the decision is subject to further judicial review" (p. 16). The court examined the University's request based on these criteria.

The court determined that the University of Colorado and the Board of Regents acted as a quasi-judicial body and were, therefore, immune as a matter of law. Naves established that

> the Colorado Constitution created the University of Colorado as a state institution of higher education [whose] Board of Regents, as a constitutional body that is not part of the legislative or executive branches, occupies a unique position in Colorado's governmental structure [that is vested with] the power to enact laws for the government of the University [which include] the grounds and process for dismissing a tenured member of the University's faculty. (pp. 4-5)

He added that these grounds and processes were enacted by the board in the *Laws of the Regents* and the board followed their laws throughout Churchill's hearings and dismissal proceedings.

Naves justified his decision to characterize Colorado's Board of Regents "as a quasi-judicial capacity and entitled to immunity from litigation for the decision reached after granting Mr. Churchill extensive due process" (Schmidt, 2009, para. 19) "because the process employed shared enough of the features of the traditional judicial process that, for purposes of immunity, it was functionally equivalent to the judicial process" (*Churchill*, 2010). He recognized that

> the protection essential to judicial independence would be entirely swept away if a lawsuit against judges could proceed upon the premise that the acts of the judge were done with partiality, or maliciously, or corruptly [and] prevents judges from being subject to intimidation as they perform their functions. (p. 9)

He cited a 10th Circuit case in which the court extended quasi-judicial immunity to a school board in a dismissal case stating that, "where an official applies preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity" (*Churchill*, 2010, p. 11). Naves added that Board of Regents included the full panalopy of rights required in judicial proceedings including:

> (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove that grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right to present witnesses; (9) the right to present oral and written closing arguments; (10) the right to respond to the faculty committee's findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review of the Board of Regents' decision. (pp. 17-18)

As such, Naves granted quasi-judicial immunity as a matter of law to the University of Colorado and the Board of Regents on Churchill's relief claim and vacated the trial jury's verdict.

Motion for reinstatement of employment. Judge Naves approached Churchill's reinstatement to the University of Colorado in three ways to determine if it was the appropriate remedy. Naves' analysis considered the following findings of the trial jury: (a) it had determination that professor Churchill suffered no actual damages, (b) reinstatement would likely result in undue interference in the academic process, (c) the relationship between the parties was irreparably damaged, and (d) reinstatement would impose harm upon others (*Churchill*, 2009). Each topic of concern was reviewed by the Court in the context of federal law as the claim fell under federal statute.

First, Naves reviewed the trial court's decision to award nominal damages to Churchill. Previously, the trial court found that Churchill "had not proven any losses or injuries through the date of the trial" (p. 31) and, therefore, awarded nominal damages of one dollar, instead of reinstatement in recognition of violation of his constitutional rights. He determined that the district court could not ignore the trial court's findings or decisions stating that "if I am required to enter an order that is consistent with the jury's findings, I cannot order a remedy that disregards the jury's implicit finding that Professor Churchill has suffered no actual damages that an award of reinstatement would prospectively remedy" (p. 31). As such, he found no reason to override the jury's findings and decision and denied Churchill's motion for reinstatement.

Second, Naves reviewed the jury's verdict based on whether "reinstatement was appropriate where it would result in undue interference in the academic process" (p. 32). He provided the University's *Administrative Policy Statement on Misconduct in Research and Authorship,* which prohibited "fabrication, falsification, plagiarism, and other forms of misappropriation of ideas, or additional practices that seriously deviate from those that are commonly accepted in the research community for proposing, conducting or reporting research" (p. 32). He added that the University operates under a "shared governance [structure] where the faculty takes the lead in decisions concerning selection of faculty, educational policy related to teaching, curriculum, research, academic ethics, and other academic matters" (p. 32) As noted in the trial exhibits, the University's Standing Committee of Research Misconduct which operated under rules approved by the faculty investigated Churchill's research, determined that he had engaged in research misconduct, and recommended his dismissal. In turn, Churchill appealed the decision to the Faculty Senate Privilege and Tenure Committee, which also determined that Churchill had engaged in research misconduct but was inconclusive on the appropriate sanction. In response, the Board of Regents decided to dismiss him based on the evidence and process followed.

Naves concluded that, "reinstating Professor Churchill would entangle the judiciary excessively in matters that are more appropriate for academic professionals" (p. 36). He understood "the concern, expressed in the statement of the present and former Chairs of the Arts and Sciences Council, that an order restoring Churchill to full standing as a faculty member [would] effectively negate the principle of autonomous

faculty control over standards of performance and membership" (p. 35) and gave "considerable weight to the United States Supreme Court's recognition to the "profound importance [of] restrained judicial review of the substance of academic decisions" (p. 36). Based on the above considerations, he found that reinstatement would result in undue interference in the academic process and was not the appropriate remedy.

Third, Naves reviewed the appropriateness of reinstatement based on the irreparable damage between Churchill and the University. He relied on Churchill's statements demonstrating hostility toward the University, which, as reported, included:

> (1) Professor Churchill's post-verdict reference to the University as having "degenerated to a not very glorified vo-tec, a trade school"; (2) Professor Churchill's reported post-verdict reference to the University's administration and witnesses as "the string of unprincipled liars the University called to the stand…"; (3) Professor Churchill's statement that "A random group of homeless people under a bridge would be far more intellectually sound and principled than anything I've encountered at the University so far."; and (4) Professor Churchill's reference to the faculty as the "ostrich factory," presumably with their heads buried in the sand. (pp. 36-37)

He also noted that Churchill had filed complaints against the members of the Privilege and Tenure Committee as well as "a research complaint against a professor of the law school for a strategic reason related to his lawsuit" (p. 38). As such, he concluded that Churchill's relationship with the University had been irreparably damaged and that his reinstatement to the University had a minor chance of success for becoming a productive relationship.

Finally, Naves reviewed Churchill's reinstatement based on the harm that it might impose on others. He recognized that

> reinstatement [would] create the perception in the broader academic community that the Department of Ethnic Studies tolerates research misconduct [and that] this perception [would] make it more difficult for the Department of Ethnic Studies to attract and retain new faculty members [as well as] hinder students graduating from the Department of Ethnic Studies in their efforts to obtain placement in graduate programs. (p. 39)

He noted the former chair of the Arts and Science Council's concerns that

> any external action to return Churchill to the faculty [would] inevitably weaken the capacity of University of Colorado faculty to hold errant or dishonest colleagues to account in future cases of academic misconduct and make it far more difficult to hold students to high standards of honesty in research and writing. (p. 39)

He found no evidence "that reinstatement is necessary to prevent a 'chilling effect' on the University of Colorado's campus" (p. 39). As such, he determined that the benefits did not outweigh the harm and denied Churchill's motion for reinstatement.

After denying reinstatement, Naves considered whether front pay was an alternative remedy. As he was bound by the trial jury's finding that Churchill suffered no actual damages, he denied front pay. On July 7, 2009, he ordered that Churchill's motion for reinstatement to employment at the University be denied for all the above reasons.

Amicus brief to court of appeals. On February 19, 2010, the American Civil Liberties Union (ACLU), American Association of University Professors (AAUP), and the National Coalition Against Censorship filed an amicus curiae brief with the Court of Appeals for the State of Colorado. Amici argued that "the trial court's decision impermissibly destroyed the First Amendment protection of over 8,000 professors in the

University of Colorado System, [that] the trial court erred in granting quasi-judicial immunity from damages and barring injunctive relief, [and, that] the trial court abused its discretion in holding that Churchill was not entitled to reinstatement (American Civil Liberties Union et. al., 2009, p. ii). Amici submitted these arguments to the court of appeals and urged them to reverse the trial court's findings and decisions.

Trial court's decision destroyed the First Amendment protection for University of Colorado professors. Amici argued that the trial court's decision rendered University faculty unprotected when engaging in lawful speech. Amici reminded the court that the Supreme Court recognized faculty speech, "such as the essay at issue in this case, [as] a special concern of the First Amendment" (p. 8) and that "teachers and students must always remain free to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (p. 9). Amici reasoned,

> the trial court's decision effectively means that regardless of the deep commitment to academic freedom, a professor cannot ever recover on a claim for unconstitutional termination based on the First Amendment, no matter how egregious or unconstitutional the termination because the Board of Regents…is absolutely immune from liability for damages and injunctive relief is not an available remedy…The court also held that…a professor would still not be entitled to reinstatement if…the professor has some hard feeling and choice words for those who unconstitutionally terminated him or her in the first place. (pp. 10-11)

They added that this was not the intention of the Supreme Court to deny a remedy for violations of a faculty member's federally protected civil rights and should not be the intention of this court and concluded that a remedy should be available to a professor when his or her rights are violated (American Civil Liberties Union et. al., 2009).

Trial court erred in granting quasi-judicial immunity. Amici argued that the trial court erred for two reasons. First, "the trial court failed to recognize Supreme Court case law making clear that absolute immunity is a limited defense available only in rare circumstances" (p. 12) and should be recognized only in narrow circumstances. Second, they "ignored Supreme Court case law emphasizing that the quasi-judicial officers who are granted this rare form of absolute immunity are neutral and independent" (p. 14). Amici discussed the granting of quasi-judicial immunity as a subset of absolute immunity and trial court's interpretation of the Federal Courts Improvement Act of 1996.

First, amici argued that absolute immunity should be granted on rare occasions "because such immunity has the grave consequence of precluding remedies for constitutional violations" (p. 13). In granting absolute immunity, the trial court "shield[ed] the Board of Regents from liability for their unconstitutional actions" (p. 13). While other forms of immunity could have been granted, amici stated that their decision to grant absolute immunity was not supported by any public interest rationale, public policy, or common law tradition and was therefore erroneous.

Second, amici addressed the trial court's error of granting immunity to the Board of Regents as they are not a neutral and independent body. Amici stated that, "quasi-judicial immunity is warranted when the overriding need to protect the independence and impartiality of entities working in judicial capacities outweighs the risk of unconstitutional behavior" (p. 14). Because the Regents are "Churchill's employer with the power to terminate him" (p. 15), they are not an "independent or impartial body,

there is nothing to protect, and the importance of providing a remedy for unconstitutional conduct prevails over the need for absolute immunity" (pp. 14-15). As University administrators, their loyalty rested with the institution. While protections provide by qualified immunity can insulate them from damages, amici concluded that the Regents should not be entitled to the "rare and sweeping defense of absolute immunity" (p. 20).

Trial court abused its discretion. Amici argued that Churchill is entitled to reinstatement as a remedy to the violation of his First Amendment rights as a matter of law and that the trial court's decision that Churchill was not entitled, was flawed. Because the trial court "found that the University was motived to terminate Churchill because of his speech…and that, despite the University's claims about Churchill's academic misconduct, Churchill would not have been terminated but for his speech" (p. 20), amici stated that "it is the historic purpose of equity to secure complete justice…where protected rights have been invaded [and] that courts will be alert to adjust their remedies so as to grant the necessary relief" (p. 21). Amici argued in favor of reinstatement as a constitutional remedy and an error in the trial court's decision-making.

First, amici argued that "reinstatement [was] the preferred and presumptive remedy" (p. 22) when an employee has been wrongfully and unconstitutional terminated. "This is especially true in First Amendment cases where reinstatement is to be awarded absent exceptional circumstances" (p. 22) and it can "make victims of discrimination whole" (p. 23). Without reinstatement as a remedy, the court "essentially

rewards an employer for its wrongful and unconstitutional conduct, as it enables the employer to accomplish exactly what the Constitution forbids–terminating an employee for unconstitutional reasons" (p. 24). To deter employers from violating employee's constitutional rights, amici concluded that reinstatement is the appropriate remedy.

Second, amici argued that, "the trial court's reason[s] for denying reinstatement [were] insufficient to overcome the presumption that reinstatement [was] the appropriate remedy" (p. 25). The trial court based its decision on three reasons, which were (a) that, because the jury awarded only nominal…instead of significant monetary damages, reinstating [Churchill] would be contrary to the jury's findings and…case law" (p. 25); (b) that the faculty committee determined that Churchill had engaged in academic misconduct and, therefore, should be denied reinstatement; and (c) that "the relationship between the University and Churchill was too fractured by the litigation [for him] to be reinstated to his faculty position" (p. 33). Amici reasoned that the trial court's justifications were inconsistent with the principle that all wrongs deserve an equitable remedy. Amici disagreed with the trial court's holding and discussed, in detail, each reason.

Amici argued that the awarding of a nominal amount, instead of a monetary value, "does not mean that Churchill's rights were not significantly violated or that Churchill did not...suffer any harm deserving a remedy" (p. 25). The trial courts awarding of nominal damages were important as a declaration that a legal wrong was committed but the joining of the nominal award amount as opposed to a significant

monetary amount to Churchill's rights violations should have been decided separately. Amici reasoned that the

> jury's decision not to award monetary relief simply [meant that they] did not want to award him significant monetary relief [not that] they believed that he was not harmed or wronged by the University for his protected speech, not that he should not be reinstated. (p. 26)

They added that, "by focusing solely on the amount of the damages awarded…, the trial court overlooked the critical role played by equitable remedies in our judicial system, especially when constitutional violations occur" (p. 28). For these reasons, amici concluded that the trial court had abused this discretion.

Next, amici argued that the University's faculty committee decision to terminate Churchill for academic misconduct should not have influenced the trial court's decision to deny reinstatement. "Because the jury rejected the University's claim that Churchill was fired for academic [reasons, amici asserted] that it was improper for the trial court subsequently to conclude that reinstatement should nevertheless be denied for that very reason" (p. 30). Adding, "the trial court's focus on the faculty committee's scholarship determination was based in the court's attempt to defer to the University and to avoid interfering with the academic process" (p. 31). Noting the Supreme Court observation in *Ewing* (1985), amici stated, "when judges are asked to review the substance of a genuinely academic decision…they should show great respect for faculty's professional judgment" (p. 32). They concluded that the decision to terminate based on academic misconduct was an academic decision and should be handled by the University. Therefore, the trial court should not be the body to deny reinstatement but instead should defer these decisions to the University.

Finally, amici argued that the trial court erred in denying Churchill's reinstatement based on the animosity between him and the University. Amici cited *Sweezy* (1957) in observing, "conflict is not unknown in the University setting given inherent autonomy to tenured professors and the academic freedom they enjoy" (p. 34). As such, while "disagreement or conflict might be sufficient grounds for denying reinstatement in certain workplaces…that is not at all the case in the University setting" (p. 35) and not the case here. While conflict is a unique quality of the University setting, amici reminded that the working relationship between a faculty member and the University's administrators and Regents does not require daily interaction and would likely not "impair the daily operation of the University as they [would never] see or interact with each other…while performing their regular duties" (p. 37). In failing to recognized this unique relationship and denying reinstatement, the trial court allowed "universit[ies] to be able to fire its professors with impunity and with no risk that the professor would be reinstated" (p. 38) even if they prevailed in court on their claims for violations of their constitutional rights. As such, amici concluded that the trial court abused its discretion by denying Churchill's reinstatement and requested the court of appeals to reverse the trial court's order and to reinstate Churchill to his University professor position.

Court of Appeals of the City and County of Denver. On November 24, 2010, the court of appeals ruled on Churchill's case against the University of Colorado. Churchill argued that the trial court erred by

> (1) directing a verdict in favor of the University of Colorado and its Board of Regents and dismissing his 42 U.S.C. § 1983 [civil action for deprivation of constitutional rights] claim that the University's investigation of his academic works constituted an adverse employment action; (2) holding as a matter of law that the University was entitled to quasi-judicial immunity, vacating the jury's verdict, and entering judgment in favor of the University on his section 1983 claim that the University violated his First Amendment rights when it dismissed him; and (3) denying his motion for reinstatement, or alternatively, money damages. (*Churchill v. University of Colorado at Boulder*, 2010, p. 1)

Judge Graham wrote the opinion of the Court and addressed the trial court's awarding of immunity to the University first and the adverse employment actions claims second.

Quasi-judicial immunity. Churchill argued, "the trial court improvidently granted the University and the Regents quasi-judicial immunity [because they had] failed to satisfy four specific conditions of immunity" (p. 12). The four conditions were

> that the Regents were not an independent body of hearing officers; that the Regents evinced bias which barred them from considering his discipline; that there is no adequate means of reviewing the Regents' decision; and that quasi-judicial immunity was not available as a defense. (p. 12)

Graham addressed each condition separately starting with a discussion of the aspects and the criteria of absolute and quasi-judicial immunity and the University's right to use of them as their defense.

Absolute and quasi-judicial immunity provide public officials who act in a judicial capacity with protections from lawsuits. Graham stated, "absolute immunity provides judges and prosecutors with [protections from lawsuit and] a complete defense [in order] to preserve their independent decision-making and to prevent undue deflection of attention from public duties" (p. 13). These protections are available to University executives, administrators, governmental agents, and public servants such as the Regents when their official actions "bear similarity to the adjudicatory function performed by

courts [and they] reach their decision by applying preexisting legal standards or policy considerations to present and past facts" (p. 14). Governmental bodies that function within these guidelines are acting in a quasi-judicial capacity and are immune based on a "matter of law."

Graham rejected Churchill's claim that the court erred in granting immunity based on the six conditions of immunity defined in *Cleavinger* (1985) and mentioned in *Butz* (*Churchill*, 2010). He stated that the conditions for determining absolute immunity are

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. (p. 16)

He rejected Churchill's argument as he perceived "nothing in *Cleavinger* that requires the strict application of the *Butz* factors [as a litmus test] in determining whether a board or governmental body should be granted absolute immunity" (p. 17). Instead he applied the decisions made by the Colorado Supreme Court in *Cherry Hill* (1988). In this case, the Court explained the "essence of quasi-judicial actions and three defining factors which must exist in order for a tribunal to act in a judicial or quasi-judicial capacity" (p. 17). These factors are that

> (1) a state or local law requiring that the governmental body give adequate notice before acting on the matter; (2) a state or local law requiring the governmental body to conduct a public hearing, pursuant to notice, at which concerned citizens may be heard and present evidence; and (3) a state or local law requiring the governmental body to make a determination based upon an application of legal criteria to the particular facts before it. (pp. 17-18)

As such, Graham found that the board was

> empowered by the Colorado Constitution and statute to enact laws governing the University, [employed] strict guidelines under laws promulgated by them, afforded adequate notice of public hearings, and invoked an adversary process in which Churchill was represented by counsel and permitted to introduce evidence, examine witnesses, and make argument. (p. 19)

He concluded that the University's policies and procedures "shared enough of the features of a traditional judicial process that, for the purposes of immunity, it was functionally equivalent to a judicial process" (p. 18). He perceived no issue in the University's use of immunity as a defense and found no error in the trial court's decision to grant quasi-judicial immunity to the University of Colorado and their Board of Regents.

Next, Graham returned to the first condition for quasi-judicial immunity, which is that the process must assure the independence of the reviewing officials. "Churchill contend[ed] that the Regents were not an independent, professional body of hearing officers and that the Regents lacked political independence" (p. 22) because they were elected officials and susceptible to political pressures to make decisions that protect the University. He reiterated that the Regents are "empowered to enact laws for the government of the University" (p. 22) which included procedures to terminate faulty. He added that they "are not part of the executive or legislative branches [of the State of Colorado], which assures that they can conduct their functions without harassment or intimidation" (p. 23). Because the dismissal process included "a multi-step review which provided independent investigation and evaluation by peers, independent faculty members, and elected officials" (p. 25), Graham found that the process included

extensive procedural safeguards for the Regents to act impartially. As such, he concluded the Regent's policies and University's procedures satisfied the factors identified in *Cherry Hill* (1988) and agreed with the trial court's analysis that the process used resembled a judicial process.

The next condition reviewed considered the Regent's immunity based on their ability to arbitrate and make decisions in an un-biased manner. Churchill contended, "that the Regents evidenced bias against him, indicating that they were not impartial arbiters and…ought not be cloaked by immunity" (p. 29). He added, "that, if [they] had been judges, they would have been required to recuse themselves under one or more of the Canons of Judicial Conduct" (p. 29). Judge Graham disagreed stating that quasi-judicial immunity provided a "protection essential to independence and discretion by the University and the Regents would be gone if they were subject to the intimidation of a lawsuit seeking to undo every decision to terminate a faculty member" (p. 31). He added that

> [d]ecisions to discipline professors who do not meet standards of integrity or scholarship will no doubt be unpopular and disputed. But such self-policing does not indicate bias and it ought not subject faculty and the Regents to liability for enforcement. Otherwise academic freedom would not be preserved. Thus, even against claims of bias, a judge or an official performing quasi-judicial functions can be immune from suit. (p. 32)

In reviewing the evidence submitted by Churchill, Graham found no support for Churchill's contention that the unpopular decisions made by the Regents were biased. He reiterated the court's reluctance to be involved in academic decisions adding that just because "a University is zealous in policing the academic standards of its faculty does

not demonstrate bias against a noncompliant faculty so much as it demonstrates a bias in favor of compliance with the rules of academia" (pp. 35-36) and concluded that the Regents had not exhibited bias in their decisions.

The third and final condition Churchill cited, as a requirement to satisfy quasi-judicial immunity, was there must be a means to review the Regents' decisions. He "contend[ed] that the process employed by the University and the Regents [were not] subject to adequate appellate review" (p. 36) for their bias and lack of independence and that this limited his ability to challenge the University's defense of immunity. Graham stated he was

> unaware of any Colorado decision which requires full appellate review of quasi-judicial action [and that the] district court's review [was] limited to a determination of whether the body or officer exceeded its jurisdiction or abused its discretion based on the evidence in the record" (p. 36)

He found no "standing for the proposition that a governmental body may not be afforded quasi-judicial immunity if its actions are only reviewable for an abuse of discretion" (p. 38). As such, he rejected Churchill's contention that the defense of quasi-judicial immunity was not available and concluded that the policies and procedures used by the University and the Regents were equivalent to a judicial process.

Equitable relief. Graham reviewed Churchill's claim that the University's quasi-judicial immunity did not apply to his request for equitable remedies such as reinstatement and front-pay. Section 1983, amended in 1996, "bars injunctive relief "against a judicial officer for an act or omission taken in such officer's judicial capacity…unless a declaratory decree was violated or declaratory relief was unavailable" (p. 41). As Churchill did not assert that the University had violated a decree

or demonstrated that declaratory relief was not available, Graham rejected his equitable relief claim and upheld the "trial court's conclusion that quasi-judicial immunity barred Churchill's claims for reinstatement and front pay" (p. 43).

Adverse employment action. Churchill claimed "the trial court erred in entering a direct verdict on his…First Amendment claim" (p. 44) and "that his First Amendment rights were violated because his exercise of free speech caused the investigation [which] was retaliation for exercising his First Amendment rights" (p. 48). Judge Graham's analysis included a determination of what constituted an adverse employment action and how the University's investigation can be considered retaliation when Churchill exercised his free speech rights.

To date, courts have ruled that investigations alone are not adverse and that, "to be considered adverse, the action taken must be sufficiently punitive or involve a change in employment to a new position" (p. 45) or "in the terms or conditions of employment" (p. 46). The action is not considered adverse if the employee received the same pay and continued to be employed, as was the case with Churchill. But, as the Supreme Court has determined, context does matter and "the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed" (p. 47). Graham analyzed Churchill's speech to determine if it caused the investigation and resulted in his termination.

First Amendment retaliation claims are analyzed using the *Garcetti-Pickering* test. The test required the court to assume that an adverse action occurred. In turn,

Churchill bore the burden of establishing and showing cause "that [his] constitutionally protected speech was a substantial motivating factor in [his] employer's decision to adversely alter [his] conditions of employment" (p. 49). Graham responded that Churchill continued to be paid his normal salary, lecture, and speak openly and observed that the cases cited in Churchill's argument "were not well taken" (p. 52) as they involved investigations that resulted in other wrongful actions by the employer. These actions included "transfers to new duties, unwarranted assignment of blame, reprimands concerning a false accusation, and failure to promote" (pp. 51-52). He recalled "cases from the Tenth Circuit [indicating] that action more significant than investigation alone is necessary to constitute adverse employment action" (p. 52) as well as "other federal circuits that have concluded that an employer must be permitted to investigate the potential misconduct of its employee without the fear of the investigation being interpreted as an adverse employment action" (p. 53). Graham determined that the University's investigation of Churchill's writings was not an adverse employment action, caused damage, or had a chilling effect on his or other faculty speech. Graham closed by affirming the trial court's findings that the University had quasi-judicial immunity and that the University's investigation did not constituted an adverse employment action.

Amicus Brief to Supreme Court of Colorado. On September 12 2011, the American Civil Liberties Union (ACLU) and the ACLU of Colorado (amici) submitted an amicus curiae brief to the Supreme Court of the State of Colorado detailing their concerns. Amici stated,

> the appellate court's holding that the University's investigation could not constitute retaliation for Churchill's speech conflict[ed] with both the prevailing law and the First Amendment's broad protection of academic and expressive freedom (p. 10)

Amici contented that upholding their decision would "vastly expand quasi-judicial immunity to public employers in a manner that is both inconsistent with current law and [would] undermine the enforcement of important Constitutional rights" (p. 25) as well as add "a wide range of administrative, non-judicial actors to the narrow category of 'judicial officers' who are not subject to injunctive relief" (p. 32). Amici discussed the appellate court's holdings as they related to the protection of Churchill's First Amendment rights and the provisions and accountability proved by the Civil Rights Act and U.S. Code 42 Section 1983, Civil Action for Deprivation of Rights.

University's investigation could not constituted retaliation for Churchill's speech. Amici reiterated the Supreme Court's recognition of academic freedom as a "special concern of the First Amendment" and the need to protect academic speech at universities. The University's "aggressive and hostile response" toward Churchill's scholarly freedom and the court's rejection of his retaliatory claim threatens to undermine these basic freedoms without legal recourse. Amici provided three arguments outlining the court's application of First Amendment protections to Title VII's adverse employment standard, the impact of the employer's retaliatory conduct on employee speech, and Churchill's right to a jury trial for his adverse employment outcome.

First, amici argued, "the standard for establishing a First Amendment retaliation in public employee speech cases is, and should be, broader than the standard for proving an adverse employment action under Title VII " (p. 11). In *Churchill*, the courts took a

"narrow and categorical approach [to determine whether] the investigation conducted under the auspices of the Regents was an adverse employment action [resulting] in material or tangible change in the terms of [his] contract" (p. 12), leaving the burden of proof on the employee. Instead, amici argued,

> based on the Supreme Court's framework, government retaliation against a person for engaging in free speech should be evaluated by whether the government's response would deter or chill a person of ordinary firmness from engaging in the protected speech in the future. (p. 13)

Amici recapped that the Tenth Circuit applied these standards in multiple cases and "recently suggested that the chilling-effect standard should govern cases in which public employees assert that they have suffered retaliation for speech protected by the First Amendment" (p. 15). In evaluating the retaliation suffered in this case, amici found the court interpreted adverse employment action narrowly using the Title VII's substantive provisions, which "forbid an employer from discriminating against an employee in hiring, firing, and the compensation, terms, and conditions of employment, or privileges of employment" (p. 17). Instead, amici argued that the court should have applied Title VII's anti-retaliation provisions which contains no reference to this language and "is not limited to discriminatory actions that affect the terms and conditions of employment [which is also] true under First Amendment retaliation doctrine in the context of public employment" (p. 18). While courts have argued that a broader chilling-effect test would result in a legal claim for "any trivial or de minimis government action" (pp. 18-19) toward public employees, amici disagreed and stated that the test would not result in "limitless First Amendment litigation…because it restricts actionable violations of the First Amendment to conduct that would chill a person of 'ordinary firmness' [and] deter

a reasonable public employee from engaging in speech" (p.19). As such, they concluded that the standard used by the court inappropriately contextualized the employer's retaliation based on a material change in employment rather than its long-term effect on employee speech.

Second, amici argued that "First Amendment retaliation claims ought to focus on the impact that the employer's retaliatory conduct has on speech rather than on whether that conduct fits the category of adverse employment action" (p. 19). They stated that "the proper First Amendment inquiry should focus not on which category of formal employment action the government's conduct fits, but on the impact the retaliatory conduct has on an employee's willingness to speak" (p. 20). Amici added that adverse employment actions can result in "burden[ing] faculty members in ways that could deter them from…engaging in the type of expression that prompted the University to impose these types of burdens" (p. 21). An investigation was one type of adverse action, which could lead to free speech being chilled or a faculty member being driven to resign.

Third, amici argued that "the determination of whether the University's conduct could have violated the First Amendment is a fact- and case-specific inquiry that should be determined by the jury where there is sufficient evidence to support the plaintiff's claim" (p. 22). Amici reiterated the trial jury's conclusion "that the University fired Churchill because of his protected speech (p. 23) and stated that

> it is hardly a stretch to infer that it might have found the same evidence to support a finding that the University's conduct in launching a full-scale investigation of Churchill was also retaliatory–that is, that it would have deterred a person of ordinary firmness from engaging in future speech and was motivated by antipathy toward the employee's past speech. (pp. 23-24)

Amici found that there is sufficient evidence for a jury to find that the investigation was retaliatory and that the "retaliatory investigation would have chilled the speech of a person of ordinary firmness" (p. 24). As such, amici concluded, "the trial court's direct verdict was in error and conflicts with prevailing law" (p. 25).

Court of appeals decision expands quasi-judicial immunity. Amici argued that the Court's granting of absolute judicial immunity to the Regents was inconsistent with law and "severely undermines the effectiveness of Section 1983 as a tool for enforcing constitutional remedies" (p. 25). Amici contended that (a) "the Regents are not entitled to common law absolute immunity from damages because they functioned in this case not as quasi-judicial officers, but as an employer" (p. 26), and (b) "extending absolute immunity to the Regents would create a perverse incentive for all public employers to restructure their employment decision-making processes by creating judicial boards to fire employees, thus undermining the enforcement of a wide range of Constitutional rights" (p. 30).

First, amici contended that the Regents were not employing a quasi-judicial function that entitled them as public officials to absolute immunity. While courts have "extended such immunity to a narrow category of officials who are not judges" (p. 26), amici stated that it should be used sparingly and that "officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy" (p. 26), and that it should be extended to "a narrow group of officials who are not judges, but who carry out functions that are closely analogous to the conventional judicial process" (p. 27). Amici argued that this

was not the case with the Regents as (a) they functioned under Colorado state law as the employer of University faculty…with the authority to hire and terminate employees" (p. 28), and (b) they did not function as a neutral adjudicative body as they authorized the investigation and commented publicly before and during the dispute. Even as Churchill's employer, amici concluded that absolute immunity should be removed because the Regents are protected by qualified immunity in "their individual capacities which is highly protective of official discretion" (p. 29) and, also, indemnified under state law as public officials which allows them to make decisions and perform their official duties without fear of reprisal.

Second, amici contended that, "if the Supreme Court upholds the appellate court's decision conferring absolute common law immunity on the Regents from suits for damages, there will be enormous ramifications in a vast range of public employment settings" (p. 30). Amici argued that conferring absolute immunity and making these public officials immune from lawsuit would negate a public employee's ability to sue their employer for "engaging in egregious, intentional violations of the constitutional rights" (p. 30) and "transform the employee termination processes from an administrative functions into quasi-judicial ones" (p. 30). Amici warned that this type of transformation would allow universities to use their quasi-judicial actions to "undermine enforcement in any case where a public employer is accused of unconstitutional discrimination [and] preclude public employees from pursuing any number of statutory discrimination claims" (p. 31). For these reasons, amici held that the Regent should be denied absolute immunity.

Adding administrators not the intent of Section 1983. Section 1983, amended in 1996, states, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable" (p. 32). This language was added to protect judges from damages, not administrators, or in this case, Regents. While some courts have applied these standards for public officials who act in a quasi-judicial manner, amici argued that the Regents are not entitled to, nor require this protection. Amici stated that the Regents are not entitled because they "are not actually or functionally 'judicial officers' within the meaning of Section 1983 [but rather] Ward Churchill's employer" and not required because, as Regents, they are protected by state law and not "exposed to any liability for damages or attorneys' fees in this case, even should Churchill prevail on all counts" (p. 35). Finally, amici argued that the trial court's inclusion of the Regents as judicial officers "within the meaning of Section 1983 [was] troubling because it substantially dilute[d] an important piece of the nation's constitutional remedies scheme" (p. 35). Amici added that the intent of this scheme was to allow the court to find an alternative relief when one type of remedy is barred for policy reasons" (p. 36), thus "deterring unconstitutional conduct and providing a recourse and remedy for injured parties" (p. 36). Amici resolved that, "if the appellate court's holding is upheld, Ward Churchill will have suffered an unequivocal violation of his First Amendment right to freedom of speech, but will be left without any recourse, either in the form of damages or in the form of reinstatement" (pp. 36-37). As such, amici closed stating, "the Court of Appeal's decision should be reversed and [the]

case…remanded to the trial court" (p. 37). Amici respectfully submitted the amicus brief to the Supreme Court of the State of Colorado on September 12, 2011.

Supreme Court of Colorado. On May 31, 2011, the Supreme Court for Colorado granted Churchill's petition for a writ of *certiorari* to review his case (*Churchill*, 2011). The issues that the Court agreed to review included,

> 1. Whether the granting of quasi-judicial immunity to the Regents of the University of Colorado for their termination of a tenured professor comports with federal law for actions brought under [Section] 1983.
>
> 2. Whether the denial of equitable remedies for termination in violation of the First Amendment undermines the purposes of [Section] 1983.
>
> 3. Whether a public University's investigation of a tenured professor's work product can constitute an adverse employment action for the purposes of a First Amendment claim brought under [Section] 1983 when, as a result of the investigation, the tenured professor also experiences adverse employment action. (*Churchill*, 2012, p. 15)

Judge Bender delivered the opinion of the court and the analysis of the issues.

Quasi and absolute immunity. The court found that the Regents and the University administrators had quasi-judicial immunity due to the practices and policies followed throughout their investigation. Bender established that "the Supreme Court has recognized that public officials, in their individual capacities, may be immune from suits seeking compensatory damages under two distinct common law doctrines of immunity: qualified immunity and absolute immunity" (p. 20). Defining each, Bender stated,

> [q]ualified immunity applies to a public official's conduct when she takes a discretionary action that a reasonable person would not know violates a clearly established constitutional right of the plaintiff [while] absolute immunity protects a public official's conduct that violates a plaintiff's constitutional rights even if that conduct was malicious. (p. 20)

Adding, "the doctrine of absolute immunity has…been extended to provide immunity for the quasi-judicial decision-making powers that the legislature or Constitution vests in certain administrative officials" (p. 21). This form of immunity provides a "public official with complete and total immunity from suit, irrespective of how egregious or unlawful the action may have been" (p. 23). Bender stated that this

> logic has been extended in some instances to provide absolute immunity to other public officials tasked with quasi-judicial decision-making responsibilities…because, as the Supreme Court has concluded, some quasi-judicial actions are so similar in function to that of the judiciary that the threat of liability for those actions implicates the…the need to preserve the neutrality of such functions and to protect the officials carrying them out from the constant threat of frivolous litigation for merely doing the job that society has collectively asked them to do. (p. 24)

To determine if the Regents acted in a quasi-judicial manner, the Supreme Court defined all factors that must be satisfied as follows:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. (p. 25)

After a reviewing each factor, Bender concluded that the Regents acted in a judicial manner and, therefore, granted quasi-judicial immunity.

Equitable relief. Bender addressed Churchill's claim that he was entitled to equitable relief in the form of "reinstatement and front pay under Section 1983, given the jury's finding that his employment was terminated in retaliation for his controversial essay" (Churchill, 2012, p. 38). In his claim, Churchill asserted, "that even if the Regents are absolutely immune from damages under the common law doctrine of quasi-

judicial absolute immunity, the trial court erred by failing to consider his claim for prospective injunctive relief" (p. 39). Citing Simmons, he added, the court "held that equitable remedies for Section 1983 violations could be enforced against quasi-judicial officers, irrespective of any common law quasi-judicial absolute immunity from suits seeking monetary damages" (pp. 39-40). In response, the University referenced Pelletier (2008) which "reject[ed] this reading and [held] that quasi-judicial officers are included within Section1983's exemption for judicial officers from suits in equity" (p. 40). Instead of arguing federal court precedent, Bender turned to the trial court's decision.

The trial court denied Churchill's claim of equitable relief and award him nominal damages in the amount of $1. The trial court's ruling held that

> Churchill's request for equitable remedies was not justified given the combination of Churchill's academic dishonesty, the strained relationship between the employer and employee, the jury verdict of one dollar in compensatory damages, and his failure to mitigate his alleged damages. (p. 40)

Bender reviewed the trial court's ruling to determine if they had erred and if their "denial of both front pay and reinstatement [was] an abuse of discretion" (p. 41).

To begin his analysis, Bender recognized that "the [trial] jury verdict by necessary implication reflects the resolution of a common factual issue…the [trial] court may not ignore that determination" (p. 41). The trail court's decision to deny reinstatement was based on their finding

> that the relationship between Churchill and the University was marred by an absence of mutual trust and thus was irretrievably broken[,] that forcing the University to reinstate Churchill would result in a substantial distraction that would negatively impact the University's core mission to educate its students and advance academic and scientific research[,] that ordering Churchill's reinstatement would impair the University's ability to ensure that its faculty maintained rigorous levels of academic integrity and would restrict its academic autonomy[, and] that reinstatement could

> tarnish the reputation of the institution generally and the Ethnic Studies Department specifically. (pp. 42-43)

Concerning front pay, Bender added that it

> was inappropriate because Churchill failed to show that he had made any attempt to mitigate his lost salary during the period between the termination of his tenured employment and the initiation of the present suit, and the jury determined that he suffered nominal damages of one dollar. (p. 43)

As such, Bender found that the trial court had not erred or abused its discretion in denying Churchill's reinstatement and front pay claims and "affirmed the denial of Churchill's request for equitable relief" (p. 43).

Bad faith investigation claim. Finally, Bender reviewed Churchill' claim "that the court of appeals erred in affirming the trial court's directed verdict in favor of the Regents on his bad faith investigation claim…because it found that the investigation did not constitute an adverse employment action" (p. 44). He based his claim on two factors.

> First, Churchill argue[d] that the Regents' investigation constituted an adverse employment action. Second, he contend[ed] that the investigation claim is not duplicative of his termination claim, and thus, the Regents' potential immunity from the termination claim cannot subsume a separate analysis of immunity on his investigation claim. (p. 44)

In order to address these factors, Bender first needed to consider "the threshold issue of immunity before considering whether the investigation constituted an adverse employment action" (p. 44) and began with the "question of whether the Regents [were] entitled to the protection of qualified immunity for their decision to investigate Churchill's academic integrity (p. 45). Bender recognized that the standard of

> qualified immunity balances [on] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. (p. 45)

To evaluate these interests,

> [t]he Supreme Court has established a two-pronged inquiry to determine whether a public official's action is entitled to qualified immunity. Under the first prong, we view the facts in the light most favorable to the plaintiff and look to see whether the allegedly wrongful conduct violated a statutory or constitutional right or law. The second prong requires us to determine whether that statutory or constitutional right or law was "clearly established" in the context in which the claim arose. That is, "whether it would be clear to a reasonable [public official] that his conduct was unlawful in the situation he confronted. (p. 46)

After review, Bender concluded, "that a reasonable public official would not know that the initiation of an employment investigation in response to protected speech would be unlawful, (p. 48) and therefore, the second prong of the test cannot be met. As such, Bender found that the trail court "did not err in granting the Regents' motion for a directed verdict on Churchill's bad faith investigation claim" (p. 49) and denied all of Churchill's claims.

Analysis

The *Churchill* case was filed in the District Court of the City and County of Denver, Colorado in July 2007 and decided by the Supreme Court of Colorado on September 10, 2012. The analysis of the opinions and briefs of the district court, amicus brief to the court of appeals, court of appeals, amicus brief to the Supreme Court of Colorado, and the Supreme Court of Colorado identified 10 themes with 118, 110, 132, 108 and 65 coded references respectively for a total of 533 coded references. The themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 8.1. The themes are sorted by the total column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions and briefs.

Table 8.1

Coded References by Theme and Court

Themes	District court	Amicus brief to court of appeals	Court of appeals	Amicus brief to supreme court	Supreme Court of Colorado	Totals by Theme
Immunity of public officials	48	19	41	21	33	162
First Amendment	8	16	25	25	4	78
Adverse employment action	8	7	17	32	2	66
Reinstatement to the University	15	26	5	1	5	52
Neutrality of university's decision-making	3	10	28	4	6	51
Equitable relief - nominal damages	11	12	5	6	11	45
Chilling effect	3	1	4	16	1	25
Employer-employee relationship irreparably damaged	13	8	1	0	2	24
Academic freedom	1	8	6	3	1	19
Professional integrity	8	3	0	0	0	11
Totals of opinions and briefs	118	110	132	108	65	533

In order to validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all the opinions and briefs. The usage of each word was reviewed and assigned to each of the above themes. The first query scanned word frequency across all the court opinions to identify the 50 most prevalent three or more letter keywords. Each keyword's contextual usage in each court opinion was analyzed to determine whether the individual keyword was significant or required

one or more adjacent words from the opinions or briefs to improve meaning. Themes with no applicable keywords utilized the theme title or words within the title. These were added to the list of keywords or phrases. These keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and brief and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 25 remained relevant to the analysis and 25 were dropped due to irrelevance, vagueness, or lack specificity. Nine of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. In addition, 10 words were defined and applied to themes that had no keywords found in the query. Fourteen phrases consisting of keywords and adjacent words in the opinions or theme titles were also identified. Each keyword and phrase was aligned with one of the 10 themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion and brief. Each occurrence in each opinion was reviewed to eliminate redundancy. Where redundancy was found, the query was refined and rerun. The query results were tabulated by court opinion and brief and sorted in descending order by the total number of references for each theme. The results are provided in Table 8.2.

Table 8.2

Keywords and Phrases Totaled Theme and Court Cases or Brief and Sorted by Theme

Themes	Key words	District Court	Amicus Brief to Court of Appeals	Court of Appeals	Amicus Brief to Supreme Court	Supreme Court of Colorado	Totals by Theme
Immunity of Public Officials	Quasi, qualified immunity, absolute immunity, immune, matter of law, public official, Section 1983	71	65	86	75	220	517
Adverse employment action	Retaliat*, adverse, investigation, dismissal	40	6	172	147	109	474
First Amendment	First Amendment, constitutional, protected speech, free speech	21	58	43	104	57	283
Reinstatement to the University	Reinstat*, remedy	85	120	18	16	29	268
Professional Integrity	Integrity, misconduct	27	11	40	8	41	127
Equitable relief - nominal damages	Equitable relief, injunctive relief, nominal damages	15	35	6	22	27	105
Neutrality of University's decision-making	Neutral*, independ*, bias*	3	28	34	8	21	94
Employer-employee relationship irreparably damaged	Irrepar*, hostil*, trust, relationship	13	17	2	1	10	43
Chilling Effect	Chill*	1	2	8	19	3	33
Academic Freedom	Academic freedom, special concern	1	9	4	2	0	16

The theme rankings in Table 8.1 and 8.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in the tables, the four most prevalent themes were immunity of public officials, First Amendment, adverse employment action, and reinstatement to the University. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 8.3. The highest correlations were between the First Amendment and adverse employment action themes (0.89357) and the First Amendment and reinstatement to the University themes (0.80651).

Table 8.3

Pearson Correlation Coefficients for the Prevalent Themes

Theme	Immunity of public official	First Amendment	Reinstatement to the University	Adverse employment action
Immunity of public officials	1.00000	0.71270	0.68663	0.64188
First Amendment	0.71270	1.00000	0.80651	0.89357
Reinstatement to the University	0.68663	0.80651	1.00000	0.70240
Adverse employment action	0.64188	0.89357	0.70240	1.00000

The prevalent themes are discussed based on the order provided in Table 8.4. A line graph of Table 8.4's coded references by opinion and brief is provided in Figure

Table 8.4

Number of Coded References in Prevalent Themes by Court Opinion and Brief

Themes	District court	Amicus brief to court of appeals	Court of appeals	Amicus brief to supreme court	Supreme Court of Colorado	Totals by Theme
Immunity of public officials	48	19	41	21	33	162
First Amendment	8	16	25	25	4	78
Adverse employment action	8	7	17	32	2	66
Reinstatement to the University	15	26	5	1	5	52

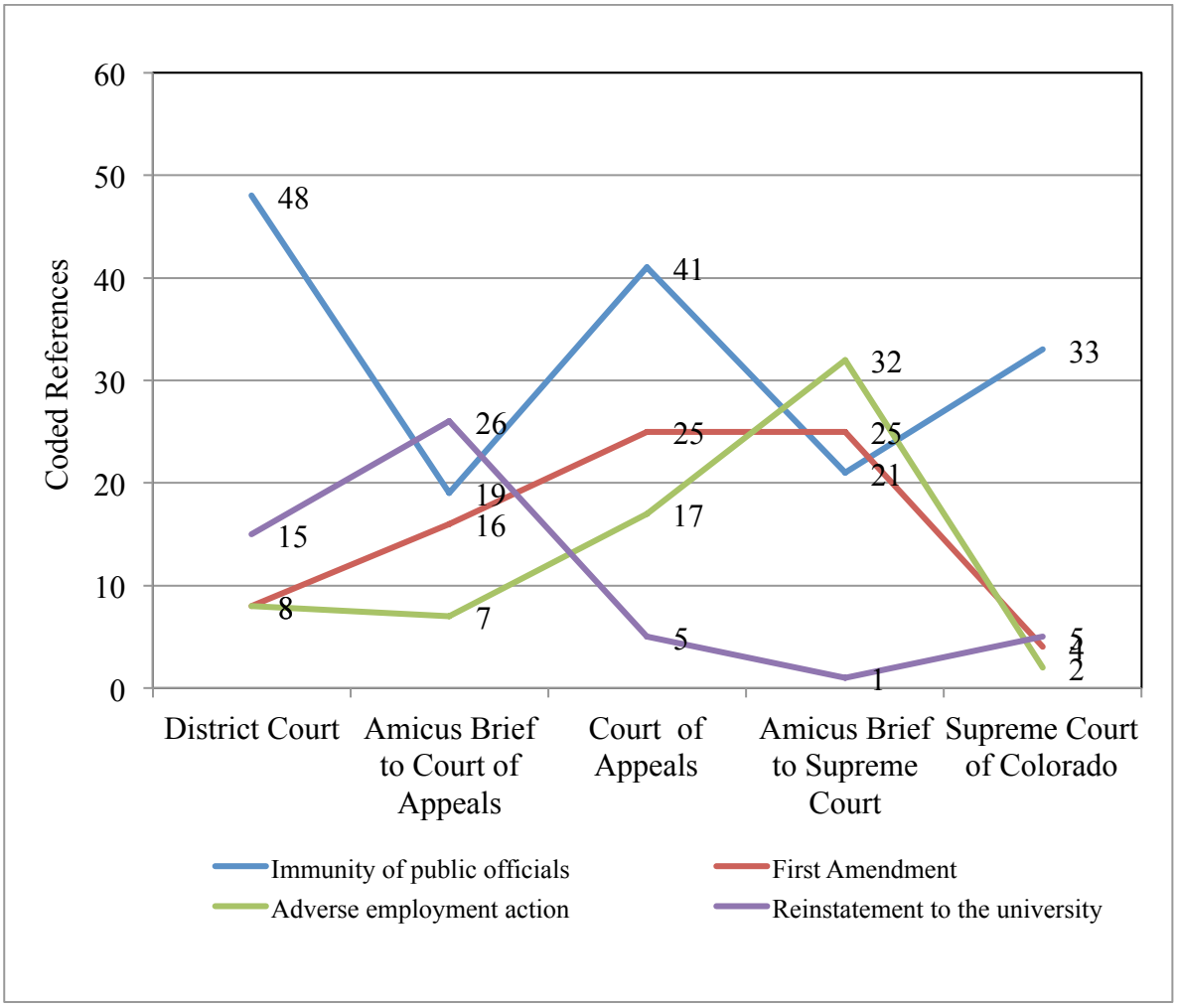


Figure 8.1. Four Most Prevalent Themes Based on Coded References

Immunity of public officials. The immunity of public officials was the most prevalent theme. The theme focused on the University and the board of Regents' right to immunity based on federal and state law and their role as a quasi-judicial body when enforcing University policy and procedures. One hundred and sixty-two references were coded from the opinions and briefs with 48, 19, 41, 21, and 33 in the district court, amicus brief to the court of appeals, court of appeals, amicus brief to the Supreme Court

of Colorado, and the Supreme Court of Colorado respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and briefs, the theme overlapped the neutrality of the University's decision-making, equitable relief-nominal damages, reinstatement to the University, and adverse employment action themes 16, 8, 5, and 4 times respectively. Table 8.5 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the immunity of public officials theme.

Table 8.5

Matrix Coding of the Four Prevalent Themes That Overlap the Immunity of Public Officials

Themes	District Court	Amicus Brief to Court of Appeals	Court of Appeals	Amicus Brief to Supreme Court	Supreme Court of Colorado	Totals by Theme
Neutrality of University's decision-making	3	6	5	1	1	16
Equitable relief - nominal damages	0	2	0	0	6	8
Reinstatement to the University	0	3	2	0	0	5
Adverse employment action	0	1	1	0	2	4

District court. The district court considered the University's motion for immunity "on the ground[s] that it is barred [them from lawsuit] by the doctrine of quasi-judicial immunity" (Churchill, 2009, p. 2). To alleviate legal costs and expedite the case, the University agreed to

> waive its immunity to claims for damages under the Eleventh Amendment to the United States Constitution to permit the same recovery from the University that might otherwise be had against any of its officials or employees acting in their official or individual capacities, reserving to the University the ability to present the same defenses that would have been applicable to any of its officials or employees acting in their official or individual capacities. (p. 4)

In doing so, the University could use quasi-immunity as a defense and eliminate the multiple lawsuits that would have occurred if Churchill sued the University and each Regent separately.

Judge Naves reiterated the Supreme Court's recognition of immunity for public officials in *Butz* stating, "[w]hen government officials make judgments that are 'functionally comparable' to those of judges, quasi-judicial immunity creates an absolute bar to liability" (p. 9) and that this type of "immunity exists not because of an official's particular location within the Government but because of the special nature of [his or her] responsibilities" (p. 9). Quoting *Widder*, he added that, "where an official applies preexisting legal standards or policy considerations to present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity" (p. 11). These standards, policies, and proceedings included those required to discipline and terminate faculty.

In reviewing the University's process, Naves found that the "[r]egents performed a quasi- judicial function and acted in a quasi-judicial capacity when it heard Professor

Churchill's case and terminated his employment" (p. 14). On review, he determined that the

> decision occurred with sufficient procedural protections for the Court to grant quasi-judicial immunity, including: (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove that grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right to present witnesses; (9) the right to present oral and written closing arguments; (10) the right to respond to the faculty committee's findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review of the Board of Regents' decision. (p. 18)

As such, Naves found that the Regents satisfied the criteria for performing their judicial role.

While Churchill argued, "the University is not entitled to quasi-judicial immunity because the University waived its Eleventh Amendment immunity" (p. 18), Naves disagreed, asserting that each type of immunity is different. He stated that "quasi-judicial immunity examines the type of action giving rise to the claim [and that,] if the government official performs a judicial action, he is immune from liability, even if he cannot claim Eleventh Amendment immunity" (p. 18). In turn, Churchill rebutted that "quasi-judicial immunity should not apply because the Regents are elected into office and subject to political pressure" (p. 19). Naves disagreed, stating that the "proper focus is upon the function that the governmental official performs, not the means by which he acquired his office [and that] Churchill's dismissal was a function that was judicial in

nature" (p. 20). As such, Naves granted quasi-judicial immunity as a matter of law to the University and Regents.

Amicus brief to court of appeals. Amici contended that the trial court erred in (a) granting quasi-judicial immunity to the University and Regents and (b) barring injunctive relief against them in the face of the jury's decision that Churchill's First Amendment rights had been violated. Amici reiterated *Butz* stating that "[t]he trial court ignored Supreme Court case law emphasizing the limited availability of absolute immunity and the importance of neutrality and independence in decision makers entitled to this quasi-judicial immunity" (ACLU, 2010, p. 2). Amici argued that "the Regents were far from neutral or independent, as they represent[ed] the University, Churchill's employer" (p. 15) and were "never separated from their roles as administrators of the University who generally supervise[d] the University, exercise[d] exclusive control over its funds and appropriations, and appointed faculty members" (pp. 15-16). Amici cautioned that upholding the district court's decision

> effectively mean[t] that regardless of the deep commitment to academic freedom, a professor [could] not ever recover on [an injunctive relief] claim for unconstitutional termination based on the First Amendment, no matter how egregious or unconstitutional the termination, because the Board of Regents, the entity with the ultimate authority to terminate professors, is absolutely immune from liability for damages and injunctive relief is not available. (p. 10)

In Colorado, the decision would deny "the availability of a remedy to over 8,000 professors in the University of Colorado System who could otherwise be terminated unconstitutionally without recourse" (p. 20). As such, amici resolved that "absolute

immunity [was] not appropriate in such circumstances where individuals are not professional hearing officers, but [rather] officials...temporarily diverted from their usual duties...under obvious pressure to resolve a disciplinary dispute in favor of the institution" (p. 16). As such, amici concluded that the Regents should not be entitled to absolute immunity.

Court of appeals. The court of appeals reviewed Churchill's motion that the district court erred in granting quasi-judicial immunity to the University and the Regents. Churchill contended

> that the University and the Regents failed to satisfy four specific conditions of immunity: that the Regents were not an independent body of hearing officers; that the Regents evinced bias which barred them from considering his discipline; that there is no adequate means of reviewing the Regents' decision; and that quasi-judicial immunity was not available as a defense. (*Churchill*, 2010, p. 11)

In *de novo*, Judge Graham rejected Churchill's motion and discussed the process followed by the Regents and each contention individually.

Graham determined that the Regent's process "incorporate[d] many of the characteristics of the judicial process" (p. 19). He stated that the "entire process employed by the Regents followed strict guidelines under laws promulgated by them, afforded adequate notice of public hearings, and invoked an adversary process in which Churchill was represented by counsel and permitted to introduce evidence, examine witnesses, and make argument" (p. 19). He added that "the nature of the decision reached by the University and its Regents, and the process by which that decision was reached, shared enough characteristics with the judicial process to

warrant absolute immunity from liability" (pp. 21-22). The process provided the following.

- [An] investigation of the allegations of Churchill's research misconduct and the dismissal process involved twenty-five faculty members (six Inquiry Committee members, five Investigative Committee members, nine SCRM members, and five P&T Committee members);
- Dismissal was only determined upon proof of cause, including clear and convincing evidence of "conduct which [fell] below minimum standards of professional integrity."
- Churchill received written notification of the intent to dismiss and was granted the right to contest it with the aid of counsel.
- Churchill exercised his right to request that specific P&T Committee members be excluded.
- Churchill exercised his right to be represented by counsel at various stages of the proceedings.
- Churchill was granted the right to have fellow faculty members sit as the members of the P&T Committee.
- Churchill exercised his right to cross-examine witnesses.
- Churchill presented witnesses, including expert witnesses.
- Churchill was granted the right to present opening statements.
- Churchill exercised his right to present both oral and written closing arguments.
- The University was required to demonstrate grounds for Churchill's dismissal by clear and convincing evidence.
- Churchill had the benefit of a written report prepared by the P&T Committee which contained findings of fact, conclusions, and recommendations.
- Churchill exercised his right to object to the P&T Committee's findings and recommendations.
- Churchill had the right to file a written report with the Board of Regents regarding the University President's recommendation for dismissal.
- Churchill demanded and was granted under the Laws a hearing before the Board of Regents in which he was represented by counsel who presented and argued his case.

- The Board of Regents' decision was limited to the record of the case and the transcript of the proceedings before the P&T Committee. (Here, Churchill was afforded both a transcribed record and a video record of proceedings.);
- The Board of Regents was required to take action on the President's recommendation in a public meeting. (pp. 26-28)

As the University followed policies and procedures that resembled a judicial process, Graham found no error in the district court's justification for applying quasi-immunity in this case.

Next, Graham reviewed Churchill's contentions that the Regents were not independent and, therefore, biased against him. Graham stated,

> [d]ecisions to discipline professors who do not meet standards of integrity or scholarship will no doubt be unpopular and disputed [but that] such self-policing does not indicate bias and it ought not subject faculty and the Regents to liability for enforcement. (p. 32)

He argued, "[t]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw [and] even against claims of bias, a judge or an official performing quasi-judicial functions can be immune from suit" (p. 32). As such, he rejected Churchill's claims.

Finally, Graham reviewed Churchill's contention that there was no adequate way for appeal as the district court's granting of quasi-judicial immunity circumvented his availability of a defense. Graham rejected the claim stating,

> Churchill ignore[d] his own stipulation that as part of the trial process, the University would be entitled to claim the defense of quasi-judicial immunity in exchange for dismissal of individuals and the ability of the University to assert any individual defenses the individuals could have asserted. (p. 39)

Graham upheld the district courts holding of quasi-judicial immunity for the University and Regents.

Amicus brief to the Supreme Court of Colorado. Amici, the ACLU, argued that the court's broadening of quasi-judicial immunity "unjustifiably leaves public employees who suffer any constitutional violations without any remedy and completely insulates a vast range of administrative officials from legal accountability" (ACLU, 2011, p. 2). Amici acknowledged that "traditional judges are absolutely immune from damages claims for constitutional violations [which has been] extended…to a narrow category of officials who are not judges, but who carry out functions that are closely analogous to the conventional judicial process" (pp. 26-27). But, amici warned, "[t]his does not mean…that all executive or administrative officials can cloak themselves with the protection of absolute immunity simply by characterizing their work as judicial" (p. 27). In this case, amici contended, "the Board of Regents [were] at all times functioning as an employer, not a neutral quasi-judicial body" (p. 27). Amici argued that if the decision is upheld, "public employers across the state [would] have a compelling incentive to artificially transform their employment termination processes, which have historically been understood as administrative functions, into quasi-judicial ones" (p. 30). Additionally, amici stated, "[t]his restructuring of the public employment process [would] affect not only free speech cases such as this one, but all other constitutional claims where an employee assert[ed] that his or her public employer engaged in unconstitutional discrimination" (p. 31). Without the ability to hold officials accountable, claims such as Churchill's equitable relief claim would have no defense in

the courts and "preclude [other] public employees from pursuing any number of statutory discrimination claims" (p. 31). Amici concluded their brief stating that quasi-judicial immunity "was intended to protect state judges, not administrative officials like the members of the University's Board of Regents [and that the] limitations on equitable relief should be read to apply only to defendants who are traditional judicial officers, such as justices, judges and magistrates" (p. 33). As such, amici asked that the Supreme Court of Colorado to reverse the court of appeals' decision and remand the case for trial.

Supreme Court of Colorado. The Supreme Court held that that the Regents were entitled to absolute immunity and that Churchill's "bad-faith investigation [was] barred by qualified immunity as the Regents' investigation into Churchill's academic record does not implicate a clearly established statutory or constitutional right or law" (*Churchill*, 2012, p. 1). Chief Justice Bender stated that the "Supreme Court has recognized that public officials, in their individual capacities, may be immune from suits seeking compensatory damages under two distinct common law doctrines of immunity: qualified immunity and absolute immunity" (p. 20). Each type of immunity protects public officials from liability when they act in their official capacities.

> Qualified immunity applies to a public official's conduct when [he or she takes] a discretionary action that a reasonable person would not know violates a clearly established constitutional right of the plaintiff. [A]bsolute immunity protects a public official's conduct that violates a plaintiff's constitutional rights even if that conduct was malicious [and] is available to a narrower class of public officials, those whose special functions or constitutional status requires complete protection from suit. (pp. 20-21)

Bender added that, "[u]nder Supreme Court precedent, neither absolute nor qualified immunity applies to Section 1983 [civil rights] actions where plaintiffs seek equitable relief" (p. 22). Bender reviewed Churchill's claims that the court erred in granting this immunity to the University and Regents separately.

Bender found that the Regents were entitled to "absolute immunity because their role as quasi-judicial public officials was functionally comparable to the role of a judge" (p. 23). He recognized the Supreme Court's caution in applying the doctrine stating that it has been applied "sparingly [in] those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business" (p. 23) and where "decisions…might be compromised if subjected to the constant threat of retaliatory litigation" (p. 24). He contended, "[a]lthough not categorically protected by absolute immunity in the same way that judges and prosecutors are, officials [such as the Regents] engaged in quasi-judicial decision-making [or actions] may be absolutely shielded from liability for acts that are 'functionally comparable' to that of a judge" (p. 25). To determine if the Regents have immunity based on their quasi-judicial actions, the Supreme Court in *Cleavinger* (1985) enumerated a list of 6 factors.

> (a) [T]he need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. (p. 25)

Bender concluded, "Churchill's argument that [the lower court's] holding that the Regents were entitled to absolute immunity from Section 1983 liability grant[ed] them carte blanche to violate the First Amendment rights of the University's employees

[was] incorrect" (p. 36) and that their "termination of Churchill was a quasi-judicial act [which] entitled [them] to protection by absolute immunity" (p. 37). He stated

> Congress's 1996 amendment to Section 1983 did not, however, clarify whether the exemption from suits seeking equitable relief against judicial officers extends to include quasi-judicial officers in the same manner that judicial absolute immunity has been extended to include certain quasi-judicial actions. (p. 39)

In reviewing the precedent provided by the University, he found that the Regents acted in a quasi-judicial manner, are included in the Section 1983 exemption and, therefore, immune.

Next, Bender reviewed Churchill's claim that the Regents should not be provided qualified immunity.

> Under the doctrine of qualified immunity, a public official is shielded from liability only when the conduct in question constitutes an activity that a reasonable person would not know is in violation of a "clearly established" federal statutory or constitutional right or law (p. 45)

To determine whether the Regents have qualified immunity, Bender applied the Supreme Court's two-prong inquiry in *Saucer* (2001). The first examined

> the facts in the light most favorable to the plaintiff and look[s] to see whether the allegedly wrongful conduct violated a statutory or constitutional right or law [and the] second…requires [the court] to determine whether that statutory or constitutional right or law was 'clearly established' in the context in which the claim arose. (p. 46)

As Churchill's claim addressed a clearly established constitutional law, Bender skipped the first prong and moved on to the second. Bender recognized,

> [t]he Supreme Court has not articulated a standard for determining whether a particular type of employment action allegedly taken in retaliation for free speech implicates a clearly established statutory or constitutional right or law in the context of the plaintiff's claim. (p. 46)

Lacking clear guidance, Bender stated, "a reasonable public official would not know that the initiation of an employment investigation in response to protected speech would be unlawful" (p. 48). Given the uncertainty in the case law, he found that the Regents are shielded by the doctrine of qualified immunity.

First Amendment. The First Amendment theme focused on the Churchill's right to protected free speech and the University's violation of his protected right, which resulted in his termination. Seventy-four references were coded from the opinions and briefs with 8, 16, 25, 25, and 4 in the district court opinion, amicus curiae brief to the court of appeals, court of appeals opinion, amicus brief to the Supreme Court of Colorado, and Supreme Court of Colorado opinion respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and briefs, the theme overlapped the adverse employment action, chilling effect, reinstatement to the University, and equitable relief - nominal damages themes 29, 10, 7, and 6 times respectively. Table 8.6 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the First Amendment theme.

Table 8.6

Matrix Coding of the Four Prevalent Themes That Overlap the First Amendment Theme

Themes	District Court	Amicus Brief to Court of Appeals	Court of Appeals	Amicus Brief to Supreme Court	Supreme Court of Colorado	Totals by Theme
Adverse employment action	3	4	5	17	0	29
Chilling effect	1	0	0	8	1	10
Reinstatement to the University	1	6	0	0	0	7
Equitable relief - nominal damages	2	3	1	0	0	6

District court. The district court reviewed Churchill's case in two parts. The first was a trial by jury to determine if his constitutional rights had been violated and, if so, damages awarded and the second a review by the district court Judge Naves to determine equitable relief. Naves instructed the trial jury to consider all the reasons for Churchill's termination in their deliberations. In their verdict, the jury found "that a majority of the members of the Board used Professor Churchill's protected speech as a motivating factor in their decision to terminate his employment" (p. 26) and "that the University failed to demonstrate that Professor Churchill would have been terminated in the absence of his protected speech" (p. 27). The jury was also instructed by Naves that, if they did not find any damages, they could award Churchill one dollar for nominal damages, which they did.

Next, Naves reviewed Churchill's request for equitable relief including reinstatement for the jury's finding that his constitutional rights were violated. Naves started by stating that he is "bound by the jury's implicit finding that Professor Churchill has suffered 'no actual damages' as a result of the constitutional violation" (p. 29). Referencing the Supreme Court's decision in *Memphis Community School District*, Nave acknowledged that "[n]ominal damages, and not damages based upon some indefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury" (p. 29) which the Tenth Circuit has also followed. With no finding on actual damages, Naves considered Churchill's motion for reinstatement to the University.

In deciding to reinstate, Naves weighed "the potential harms of reinstatement against the potential benefits of reinstatement [against] whether denying reinstatement [would] effectively prevent Professor Churchill from exercising his First Amendment rights" (p. 39). Naves referenced retaliatory statements made by Churchill demonstrating "a miniscule possibility that his return to the University [would] be amicable and productive" (p. 38). Because "Churchill continues to publish articles, write books, give paid invited lectures at other institutions, and even give lectures on the University of Colorado campus" (p. 40), he determined that nothing was preventing him from exercising his free speech or would cause "a 'chilling effect' on the University of Colorado's campus" (p. 40). Naves concluded that the harm of reinstatement outweighed the benefits.

Amicus brief to court of appeals. Amici, the AAUP, urged the court of appeals to reverse the district court's decision in order "to preserve the protections of the First Amendment for University professors and to ensure that the University of Colorado and other universities cannot violate the constitutional rights of University professors with impunity" (ACLU, 2010, p. 4). Amici argued that the trial jury's decision "that Churchill's First Amendment rights were violated [and the court's ruling] that Churchill was not entitled to a remedy for the violation of these rights" (p. 10) would have a detrimental effect on faculty speech rights. These decisions mean that

> regardless of the deep commitment to academic freedom, a professor cannot ever recover on a…claim for unconstitutional termination based on the First Amendment, no matter how egregious or unconstitutional the termination, because the Board of Regents–the entity with the ultimate authority to terminate professors–is absolutely immune from liability for damages and injunctive relief.

> Making matters worse, the court also held that even if reinstatement were an available remedy, a professor would still not be entitled to reinstatement if, as is to be expected in the vast majority of such situations, the professor…has some hard feelings and choice words for those who unconstitutionally terminated him or her in the first place. (pp. 10-11)

Amici stated that "the trial court should have awarded…a remedy for this legal wrong if it truly wanted to comply with the jury's verdict that Churchill's First Amendment rights were violated" (p. 26) and that "[t]he jury's decision not to award monetary relief…does not mean that they believed that he was not harmed or wronged by the University's decision to terminate him for his protected speech, or that he should not be reinstated" (p. 26). As such, amici concluded Churchill deserved a remedy for the violation his constitutional rights–reinstatement to the University.

Court of appeals. The court of appeals reviewed Churchill's claims "that the investigation and termination (1) were unlawful adverse employment actions in violation of his rights…and (2) were in retaliation of his exercise of First Amendment rights [adding that] the Regents were always going to fire him" (pp. 8-9). Judge Graham repeated the decision of the trial jury that

> the Board of Regents of the University of Colorado use[d] [Churchill's] protected speech activity as a substantial or motivating factor in the decision to discharge [him] from employment,…that the termination harmed Churchill, [and] that the University and the Regents had not shown by a preponderance of the evidence that Churchill would have been dismissed for reasons other than his exercise of free speech. (p. 9)

To determine if Churchill's rights were violated, Graham stated that an adverse employment action must have occurred and that the retaliation for that action must be analyzed using the five-part *Pickering* test as modified by *Garcetti*. Graham addressed

Churchill's claim that his speech resulted in the University's investigation which he claimed was adverse employment action.

Based on other circuit court decisions, Graham established that "an employer must be permitted to investigate the potential misconduct of its employee without the fear of the investigation being interpreted as an adverse employment action" (p. 53). He stated that, "[w]ithout this ability…, a public employer would be left without recourse and would lose its greater leeway in its dealings with citizen employees" (p. 54). While Churchill claims that the investigation "chilled his right to free speech and [therefore] constituted an adverse action," Graham argued that "the standard is not whether his speech was chilled; it is whether the University's actions would 'deter a reasonable person from exercising his…First Amendment rights'" (p. 54). As Churchill's termination was due to his research misconduct and not his 9/11 essay, Graham found that "[t]he University's investigation of Churchill's research misconduct…did not constitute an adverse employment action for purposes of his First Amendment claim [or cause] a chilling effect on Churchill's speech and the speech of some faculty members" (p. 56). As such, Graham concluded that the termination of Churchill was not the result of any First Amendment violations by the University.

Amicus brief to the Supreme Court of Colorado. Amici claimed, by granting quasi-judicial immunity, "[t]he appellate court's decision requiring an employee to show an 'adverse employment action' unduly narrows the scope of constitutional protection for all public employees who suffer retaliation for engaging in protected speech on matters of public concern" (ACLU, 2011, p. 1). Amici stated that upholding the decision

would "severely diminish the ability of employees to establish First Amendment claims when they are punished for their speech through retaliatory employer conduct that does not neatly fall into pre-defined categories of adverse employment actions" (p. 12). They added that,

> [i]n a broad range of contexts, the Supreme Court has established that the fundamental determination of when the First Amendment has been infringed in cases where the government retaliates against a person for engaging in protected speech is whether the government's conduct would likely deter or chill a speaker from engaging in such speech in the future. (p. 13)

Amici stated that "several circuits have concluded that the Supreme Court's precedents command the application of this chilling effect standard to public employee speech cases" (p. 13) but that "the decisions of these circuits send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a 'material change' in the terms or conditions of employment" (p. 16). Amici added that "[t]he proper First Amendment inquiry should focus not on which category of formal employment action the government's conduct fits, but on the impact the retaliatory conduct has on an employee's willingness to speak" (p. 20). This conduct included the investigation of a public employee by the public employer. Amici warned that any

> [f]ailure to recognize that an extensive investigation can be actionable retaliation will lead to the under-deterrence of First Amendment violations by public employers. First, a public employer that wishes to fire an employee because of his speech might invoke an investigation as a form of harassment and use it to drive the employee to resign. Alternatively, the employer may use the investigation of an employee whom there is no basis to fire in order to search for some sort of information on which they could base a legitimate termination decision, even though this is simply a pretext for the actual reason the employer wishes to fire him. (p. 22)

Upholding this court's decision could leave public employees without the ability to speak freely on issues of public concern and give employers unfettered control over employee speech.

Amici found that the only way to safeguard public employees from retaliation is to review each case within its context and separately. "By directing a verdict on the retaliatory investigation claim, the trial court…foreclosed the jury's opportunity to consider all the facts in the context of Churchill's case, thus undermining the very context-specific inquiry that the law demands" (p. 23). They argued that,

> [i]f any case could sustain a claim that an investigation constituted retaliation, it is this one [because] there is ample evidence in the record from which a reasonable jury could conclude that the investigation itself was launched in retaliation for Churchill's past speech and there was more than sufficient evidence upon which a jury could have found that the retaliatory investigation would have chilled the speech of a person of "ordinary firmness." (p. 24)

As such, amici concluded that Churchill's speech resulted in retaliation in the form of an investigation which did not consider all the facts and that the case should be remanded for trial.

Supreme Court of Colorado. The Supreme Court discussed Churchill's First Amendment violation claim in the context of the Regent's immunity from lawsuit for their retaliatory investigation of his scholarly work resulting from his post 9/11 essay. Chief Justice Bender recognized that "Section 1983 frequently provid[ed] redress in the employment context for plaintiffs injured by a public official's retaliation for the plaintiff's protected free speech" (*Churchill*, 2012, p. 20). To grant Churchill's claim, the court needed to determine if the Regent's action/investigation in their official

capacity was adversarial and violated a constitutional right. The action must be one that "a reasonable person would not know violates a clearly established constitutional right" (p. 20). Upon review, Bender determined

> [a]lthough [the court is] mindful that a full-fledged, years-long investigation into a professor's academic record taken in bad faith could chill the continued exercise of free speech, we conclude that the federal case law in this area is too unsettled to defeat the Regents' claim of qualified immunity. (p. 48)

Lacking guidance, Bender found that "a reasonable public official would not know that the initiation of an employment investigation in response to protected speech would be unlawful" (p. 48). As such, he denied Churchill's First Amendment claims.

Adverse employment action. The third most prevalent theme was adverse employment action. The theme focused on the University's investigation of Churchill as a method of retaliating against him for engaging in speech protected under the First Amendment. Sixty-six references were coded from the opinions and briefs with 8, 7, 17, 32, and 2 in the district court opinion, amicus brief to the court of appeals, court of appeals opinion, amicus brief to the Supreme Court of Colorado, and Supreme Court of Colorado opinion respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and briefs, the theme overlapped the First Amendment, chilling effect, immunity of public officials, employer-employee relationship irreparably damaged, and equitable relief - nominal damages themes 29, 13, 4, 3, and 3 times respectively. Table 8.7 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the adverse employment action theme.

Table 8.7

Matrix Coding of the Four Prevalent Themes That Overlap the Adverse Employment Theme

Themes	District Court	Amicus Brief to Court of Appeals	Court of Appeals	Amicus Brief to Supreme Court	Supreme Court of Colorado	Totals by Theme
First Amendment	3	4	5	17	0	29
Chilling effect	1	0	0	12	0	13
Immunity of public officials	0	1	1	0	2	4
Employer-employee relationship irreparably damaged	2	1	0	0	0	3
Equitable relief - nominal damages	1	0	2	0	0	3

District court. Judge Naves reviewed the instructions given to the trial jury during their proceedings and their decisions. The jury was instructed, "that it did not have to find that the protected speech activities were the only reason [the University] acted against" (Churchill, 2009, pp. 26-27). The jury

> could award damages for any noneconomic losses or injuries that…Churchill has had to the present time, including physical and mental pain and suffering, inconvenience, emotional distress, loss of reputation, and impairment of quality of life, as well as any economic losses or injuries which plaintiff has had to the present time. (p. 27)

The jury found "that the University failed to demonstrate that Professor Churchill would have been terminated in the absence of his protected speech" (p. 27), and awarded him one dollar in damages.

Naves reviewed the trial jury's decision to determine whether Churchill's dismissal was an appropriate action. Naves argued that, if Churchill was reinstated, "there [was] a substantial likelihood that there would be future disputes about the propriety of [his] academic conduct, as well as the Department of Ethnic Studies' ability to evaluate the probity and veracity of his scholarship" (p. 34). He added that "[t]hose disputes would necessarily raise the question of whether the University has retaliated" (p. 34) and result in more lawsuits. Citing Churchill's complaints and comments against the University and the investigative committees, Naves argued that "[t]here is only a miniscule possibility that his return to the University will be amicable and productive" (p. 37) and that there is no evidence that Churchill's dismissal would not result in "a 'chilling effect' on the University of Colorado's campus" (p. 40). Naves upheld the trial jury's decision and denied Churchill's reinstatement.

Amicus brief to court of appeals. Amici stated that the district court's decision to grant immunity to the University and not reinstate Churchill was at odds with the First Amendment (ACLU, 2010). Amici contended that "the Regents [were] not entitled to the rare and sweeping defense of absolute immunity that would otherwise insulate them from monetary liability for their unconstitutional conduct" (p. 20). Amici argued that the court's award of nominal damages to Churchill did "not mean that they believed that he was not harmed or wronged by the University's decision to terminate him for his protected speech, or that he should not be reinstated" (p. 26). It meant that the jury found no monetary damages in the evidence. Amici added that upholding the Regent's immunity meant that, "even if reinstatement were an available remedy, a professor

would still not be entitled to reinstatement if…the professor has some hard feelings and choice words for those who unconstitutionally terminated him or her in the first place" (p. 11). Amici stated that overturning this decision "is the only result consistent with Supreme Court precedent and with ensuring the availability of a remedy to the over 8,000 professors in the University of Colorado system who could otherwise be terminated unconstitutionally without recourse" (p. 20). As such, amici claimed that the court abused its' discretion and the decision should be reversed.

Court of appeals. Judge Graham discussed adverse employment action based on court precedent. For an employment action to be considered adverse, Graham stated, "it must materially alter the terms or conditions of employment" (*Churchill*, 2010, p. 45). These include actions such as "discharges, demotions, refusals to hire, refusals to promote, and reprimands" (p. 46). Applicable to this case, is that the "Courts have concluded that investigations alone are not adverse employment actions" (p. 45). Graham added that, "[w]here one has the same pay and continues to work, the action is not adverse" (p. 46). These factors provided the basis for Graham's decisions in this case.

Churchill claimed that the University's investigation was an adverse employment action, which resulted in his termination. As this was a First Amendment claim, Graham utilized the *Pickering* test as modified by *Garcetti* in 2006. In his analysis, Graham determined that "Churchill [had] not establish[ed] that the University's investigation constituted an adverse employment action" (p. 50). He noted that, throughout, "Churchill continued to be paid his normal pay and benefits[,] continued to hold his

position as professor with tenure[,] taught classes[,] and was permitted to speak openly in public" (p. 50). He recognized that "[o]ther federal circuits that have concluded that an employer must be permitted to investigate the potential misconduct of its employee without the fear of the investigation being interpreted as an adverse employment action" (p. 53). He added that, "without this ability to investigate, a public employer would be left without recourse and would lose its greater leeway in its dealings with citizen employees" (p. 54). While Churchill contended that employer investigations would chill speech on campus, Graham determined that there was no evidence provided to conclude, "the University's actions would deter a reasonable person from exercising his…First Amendment rights" (p. 54) and, therefore, cause "a chilling effect on Churchill's speech and the speech of some faculty members" (p. 56). As such, Graham found that Churchill "failed to prove that the University's investigation constituted an adverse employment action" (p. 64) and upheld the trial court's decisions.

Amicus brief to Supreme Court of Colorado. Amici contended that the University's investigation of Churchill's publications was retaliation for his post 9/11 essay, "When the Chickens Come Home to Roost" and that this retaliation resulted in the adverse employment action taken against him, dismissal. While "[t]he trial court held, as a matter of law, that the University's conduct in launching a full-scale investigation of Churchill could not constitute First Amendment retaliation" (ACLU, 2011, p. 11), amici rebutted that "there was more than sufficient evidence, read in the light most favorable to Churchill, from which a reasonable jury could conclude that the University's exhaustive investigatory actions constituted unconstitutional retaliation" (p.

11). They reasoned (a) that the standards for defining First Amendment retaliation and adverse employment action under Title VII should be broader for public employees and (b) that claims based on these standards should "focus on the impact that the employer's retaliatory conduct has on [employee] speech rather than on whether the conduct fits the category of adverse employment action" (p. 19). Amici discussed each.

First, the brief stated that the court of appeals took "a narrow and categorical approach to defining what conduct constitutes retaliation [which] require[d] a determination that the investigation conducted under the auspices of the Regents was an adverse employment action" (p. 12). For the courts of appeals, adverse employment actions were defined narrowly as "the material or tangible changes in the terms or condition of employment change" (p. 12). Amici argued that this definition ignored Supreme Court precedent concerning the non-tangible, long-term chilling-effects of "whether the government's response would deter or chill a person of ordinary firmness from engaging in the protected speech in the future" (p. 13). The brief added that "the application of the chilling-effect standard to public employee speech cases" (p. 14) had been cited in some Supreme Court and Tenth Circuit cases. Other courts continued with a narrower standard based on "the standard for establishing unlawful employment discrimination in claims brought under Title VII of the 1964 Civil Rights Act" (p. 16). Citing Levinson, amici reiterated,

> the decisions of these circuits send a dangerous message to government employers that they may penalize those who exercise their First Amendment rights provided their retaliatory conduct falls short of a 'material change' in the terms or conditions of employment. (p. 16)

Amici argued that these standards would allow a "public employer [to] engage in a wide range of harassing conduct that does not change the terms or conditions of employment, but which may well chill or deter an employee from engaging in protected speech" (p. 17). To determine whether an employer has retaliated against an employee, amici stated that there should be a method for determining the non-tangible impact that the employer's retaliatory conduct has on First Amendment speech.

Next, amici contended that the court of appeals "ignored the fact that employer conduct can sharply deter an employee from engaging in speech even without formally changing the terms or conditions of his employment" (p. 19). Instead, the court should have focused "on the impact the retaliatory conduct has on an employee's willingness to speak" (p. 20). Amici argued that,

> a full scale, multi-year investigation that requires the employee to spend substantial time responding to allegations, meeting with legal counsel, testifying, and otherwise appearing at various hearings, can have a substantial impact on that employee's ability to function in his job [and] may nonetheless deter any reasonable employee from engaging in protected speech in the future. Numerous federal courts have recognized that an employer's investigation of an employee is a form of retaliation that can be part of a targeted employee's valid First Amendment claim. (p. 20)

As such, amici concluded that "[f]ailure to recognize that an extensive investigation can be actionable retaliation [would] lead to the under-deterrence of First Amendment violations by public employers" (p. 22). Therefore, the courts must broaden their view of what constitutes an adverse employment action in order to protect public employees' First Amendment rights.

Supreme Court of Colorado. The Supreme Court discussed whether the University's investigation was an adversarial action under Section 1983 (*Churchill*,

2012). Bender reminded the court that "[t]here is disagreement about whether an alleged bad faith employment investigation, absent a punitive change in employment status, is adverse and actionable under Section 1983" (p. 47) of the Civil Rights Act. Bender reiterated the "uncertainty inherent in this body of federal case law as to whether an allegedly retaliatory employment investigation is actionable under Section 1983" (p. 48) and concluded that "a reasonable public official would not know that the initiation of an employment investigation in response to protected speech would be unlawful" (p. 48). He found that the investigation did not fit the definition of an adverse employment action and upheld the court of appeal's decision to grant "the Regents motion for direct verdict on Churchill's bad faith investigation claim" (p. 49).

Reinstatement to the University. The reinstatement to the University theme focused on the court's refusal to reinstate Churchill to his position as a professor at the University of Colorado. Fifty-two references were coded from the opinions and briefs with 15, 26, 5, 1, and 5 in the district court opinion, amicus brief to the court of appeals, court of appeals opinion, amicus brief to the Supreme Court of Colorado, and Supreme Court of Colorado opinion respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and briefs, the theme overlapped the employer-employee relationship irreparably damaged, equitable relief–nominal damages, First Amendment, and immunity of public officials themes 13, 10, 7, and 5 times respectively. Table 8.8 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the reinstatement to the University theme.

Table 8.8

Matrix Coding of the Four Prevalent Themes That Overlap the Reinstatement to the University Theme

Themes	District Court	Amicus Brief to Court of Appeals	Court of Appeals	Amicus Brief to Supreme Court	Supreme Court of Colorado	Totals by Theme
Employer-employee relationship irreparably damaged	4	7	1	0	1	13
Equitable relief - nominal damages	4	4	0	1	1	10
First Amendment	1	6	0	0	0	7
Immunity of public officials	0	3	2	0	0	5

District court. The district court reviewed Churchill's request for reinstatement "to his former position of fully tenured professor at the University of Colorado, and to provide such further equitable relief as is necessary to vindicate his rights under the First Amendment to the United States Constitution" (*Churchill*, 2009, p. 2). Judge Naves reviewed the request as a matter of federal law because Churchill's claims stem from violation of federal statute. Based on these laws, Naves established that "[t]he Tenth Circuit…has found that a trial court has 'considerable discretion' in formulating remedies, one of which is reinstatement [and that] the award of equitable relief by way of reinstatement rests in the discretion of the trial court" (p. 28). He iterated the trial court's determination that Churchill had not incurred any monetary damages, "losses, or injuries through the trial date" (p. 31) and that nominal damages in the amount of one dollar was an appropriate remedy in this case. Naves added that, "if [he is] required to

enter an order that is consistent with the jury's findings, [he] cannot order a remedy that disregard[s] the jury's implicit finding that…Churchill has suffered no actual damages that an award of reinstatement would prospectively remedy" (p. 31). He concluded, "[n]ominal damages…are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury" (p. 31) and, based on the trial court's verdict denied Churchill's motion for reinstatement.

Next, Naves considered whether he would have ordered reinstatement in the absence of the trial court's verdict. He acknowledged the Supreme Court's determination in *Bakke* and *Sweezy,* "that the four essential freedoms of a University are to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (p. 34). He added that, "the University of Colorado's ability to define the standards of academic conduct is a decision that properly resides in bodies like [the] Standing Committees on Research Misconduct and the P&T Committee, not in the courts" (p. 35). Even if reinstatement were an option, Naves concluded that interfering in the University's disciplinary decisions "would entangle the judiciary excessively in matters that are more appropriate for academic professionals" (p. 36). As such, he reaffirmed the trial court's decision to deny reinstatement as equitable relief.

Amicus brief to court of appeals. In not deciding to reinstate Churchill, amici claimed that the trial court had abused their discretion (ACLU, 2010). Given the trial court's verdict that the University violated Churchill's First Amendment rights, amici argued that "reinstatement [was] the presumptive remedy because only reinstatement

can truly make a wronged employee whole" (p. 23) and "because a denial of reinstatement to a prevailing plaintiff essentially rewards an employer for its wrongful and unconstitutional conduct, as it enables the employer to accomplish exactly what the Constitution forbids, terminating an employee for unconstitutional reasons" (p. 24). Amici added, "[w]ithout explanation, the trial court fail[ed] to even mention these fundamental principles of equity [and, in doing so] abused its discretion in denying reinstatement" (p. 25). Accordingly, the brief continued with a discussion of the factors for denying Churchill's reinstatement based on the court's abuse.

First, the brief discussed the trial court's awarding of nominal damages in place of reinstatement. Amici argued,

> [t]he trial court's denial of reinstatement [was] principally based on its belief that because the jury awarded only nominal damages to Churchill instead of significant monetary damages, reinstating him to his faculty position would be contrary to the jury's findings and contrary to the caselaw. (p. 25)

On the contrary, amici added,

> [the] decision not to award monetary relief simply mean[t] that the jury decided…that they did not want to award him significant monetary relief. [It did] not mean that they believed that he was not harmed or wronged by the University's decision to terminate him for his protected speech, or that he should not be reinstated. (p. 26)

Amici contended that the courts overlooked the purpose of equitable relief as a way of preventing "government officials…from continuing to commit similar constitutional violations" (p. 29) and concluded that this oversight was an abuse of the trial court's discretion.

Second, amici argued that Churchill's academic misconduct "should not have played a role in the trial court's decision to deny reinstatement" (p. 29). Amici established that,

> because the jury rejected the University's claim that Churchill was fired for his academic misconduct, it was improper for the trial court subsequently to conclude that reinstatement should nevertheless be denied for that very reason. That conclusion enables the University effectively to dismiss Churchill for the academic misconduct even though the jury had already decided he was not terminated for that. (p. 30)

This anomaly exemplified the court's inherent reluctance to interfere in University decisions that they think are better handled by academic professionals. Amici added, "if the trial court wanted to defer to the committee's academic judgment rather than disagree with it…the court should have reinstated Churchill, not denied reinstatement" (p. 32). Following constitutional doctrines and principles, amici concluded that the trial court should not have interfered in the decision to reinstate Churchill but, instead, deferred it to "legitimate faculty decision–mak[ers] in the academic sphere" (p. 33).

Finally, amici contended that the court should not have used Churchill's relationship with the University as grounds for denying reinstatement. Amici argued,

> [a]lthough damaged relationships can be grounds for denying reinstatement in certain circumstances, that principle does not apply in the context of a University setting where a professor has been unconstitutionally terminated, absent extraordinary circumstances not present in this case. (p. 33)

The brief added that, "while disagreements or conflict might be sufficient grounds for denying reinstatement in certain workplaces where everyone is supposed to get along, [it] is not at all the case in the University setting" (p. 35). If it were, "a University would always be able to fire its professors with impunity and with no risk that the

professor might be reinstated, no matter how unconstitutional its actions might be" (p. 38). As such, amici concluded that "the trial courts failure to abide by these principles was [another] abuse of discretion" (p. 40) and that the court of appeals should reinstate Churchill to his position.

Court of appeals. Judge Graham discussed Churchill's contention that immunity did not apply to equitable remedies such as reinstatement and "that neither the University nor the Regents were immune from his request for reinstatement and front pay" (*Churchill*, 2010, p. 40). Graham disagreed citing a 1996 amendment to the section 1983 that barred "injunctive relief against a judicial officer for an act or omission taken in such officer's judicial capacity…unless a declaratory decree was violated or declaratory relief was unavailable" (p. 41). As Churchill did not claim a declaratory decree violation, Graham was unable to consider this option. In addition, he determined that the trial court's denial of "Churchill's claim for reinstatement or front pay fell within the trial court's considerable discretion to fashion equitable remedies [and perceived] nothing…that demonstrated an abuse of discretion" (p. 43). Graham concluded that he found no error in the trial court's decisions.

Amicus brief to Supreme Court of Colorado. Amici focused on the University's violation of Churchill's First amendment rights and their use of immunity to shield them from equitable relief including reinstatement and front pay. Amici argued that upholding the court of appeals' decision would result in "an unequivocal violation of [Churchill's] First Amendment right to freedom of speech [and leave him] without any recourse, either in the form of damages or in the form of reinstatement" (ACLU, 2011, pp. 36-37).

As such, amici requested that the Supreme Court reverse the decision and remand the case to trial.

Supreme Court of Colorado. The Supreme Court reviewed Churchill's claim that "the trial court abused its discretion when it ruled that he was not entitled to the equitable remedies of reinstatement and front pay" (Churchill, 2012, p. 1). Bender stated that the "award of equitable relief by way of reinstatement rests in the discretion of the trial court [and begins with a] review [of] the trial court's denial of both front pay and reinstatement for an abuse of discretion (pp. 40-41). In that review, Bender added, the court does "not look to see whether we agree with the trial court [but instead whether], the trial court's decision to ensure that it was based on credible evidence and that it did not exceed the bounds of the rationally available choices" (p. 41). Bender found,

> [t]he trial court reasoned that forcing the University to reinstate Churchill would result in a substantial distraction that would negatively impact the University's core mission to educate its students and advance academic and scientific research [and] that this made it especially likely that reinstatement would only serve to risk further instances of academic misconduct. (p. 42)

Bender concluded that the trial court's "analysis appear[ed] well–reasoned and [was] supported by both credible evidence and analogous federal case law" (p. 43). As such, he denied Churchill's claim that the trial court abused their discretion.

Summary

Churchill claimed that his First Amendment rights were violated due to the University's retaliatory investigation of his publications. The investigation resulted in his termination for professional misconduct, which Churchill argued was an adverse employment action. The trial jury reviewed the evidence and found in Churchill's favor.

They concluded that the University's investigation would not have occurred absent Churchill's 9/11 essay and that "a majority of the members of the Board used Professor Churchill's protected speech as a motivating factor in their decision to terminate his employment" (*Churchill*, 2009, p. 27). In defense, the University filed for absolute immunity as they had acted as a judicial body. In addition, the University claimed that it was empowered by the state to make employment decisions and that the policies and procedures followed throughout Churchill's proceedings were judicial in form. The district court granted immunity and the court of appeals upheld the ruling. These actions, Churchill claimed, left him and other faculty with no way of defending their First Amendment rights and to obtain equitable relief in the form of reinstatement and front pay.

Based on the above analysis, two distinct and separate defenses were used by Churchill and the University. Churchill and amici's defenses were based on defining the University's investigation as retaliatory under the First Amendment and, therefore, an adverse employment action. Because the court was not willing to broaden the definition of an adverse employment action to include non-tangible damages such as reputation and stature, Churchill failed to have the district court's decision reversed. The court held that Churchill had suffered no tangible loss and that he was not investigated and terminated for his free speech but rather for his professional misconduct.

The University's defense was that the Regents were empowered, under Colorado state law, with the authority to govern the University which included making academic employment decisions and that the University's investigation of Churchill was not a

First Amendment violation or retaliation. Because the state allocated this authority and approved the University's policies, they claimed absolute immunity under the Eleventh Amendment from lawsuits, which negated Churchill's ability to sue for monetary damages. The court reasoned that absolute immunity for officials acting in a quasi-judicial manner was warranted because "the University [including the Regents] and its employees in their official capacities are immune from suit under the doctrine of state sovereign immunity" (*Churchill*, 2012, pp. 16-17) based on the Eleventh Amendment, and because the Regent's "role as quasi-judicial public officials was functionally comparable to the role of a judge" (p. 23). As such, the district court ruled and the court of appeals upheld that the University acted in a judicial manner and was immune.

Addressing the second defense, the court of appeals held that an investigation does not constitute an adverse employment action. The court stated that "[o]ther federal circuits…have concluded that an employer must be permitted to investigate the potential misconduct of its employee without the fear of the investigation being interpreted as an adverse employment action" (*Churchill*, 2010, p. 53). The court considered only the monetary damages and changes in employment status resulting from the investigation and not the chilling-effects that an investigation would have on the public employee. Because Churchill remained employed, taught classes, published, and spoke at events throughout the investigation, the court found that he had not suffered any damages and was not adversely affected during the termination process.

The Supreme Court reviewed the lower court's decision and Churchill's adverse employment action claim to determine on the face of whether the Regents were "entitled

to…qualified immunity for their decision to investigate Churchill's academic integrity" (*Churchill*, 2012, p. 45). Churchill's adverse employment action claim would be considered second. The court began by citing (a) the lack of "a standard for determining whether a particular type of employment action allegedly taken in retaliation for free speech implicates a clearly established statutory or constitutional right or law" (*Churchill*, 2012, p. 46) and (b) the "doctrine of qualified immunity" (p. 48) which "balances two important interests–the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably" (p. 45). The court concluded that "the federal case law in this area is too unsettled to defeat the Regents' claim of qualified immunity [and] that a reasonable public official would not know that the initiation of an employment investigation in response to protected speech would be unlawful" (p. 48). Based on their immunity, the Supreme Court did not consider whether the Regents' investigation was an adverse employment action and rejected his request for reinstatement. On September 10, 2012, one day before the 11th anniversary of the 9/11 attacks, the Supreme Court upheld the lower court's decision that the district court did not err in "granting the Regents' motion for a directed verdict on Churchill's bad faith investigation claim" (p. 49) and denied Churchill's right to seek equitable relief.

Phillip DiStefano, Chancellor of the University of Colorado at Boulder, David Lane, Churchill's lawyer, and Cary Nelson, the past president of the American Association of University Professors, each provided immediate feedback on the Supreme Court's decision. DiStefano applauded the ruling stating,

> the Colorado Supreme Court [decision] upholds the high standards of academic integrity practiced every day by our faculty, and helps us to ensure the quality of instruction for all our students. It is vital that what is published and what is taught in the classroom be based on research and scholarship grounded in honest, accepted and time-tested methods. This was always what was at stake in this case for the University, and the winners today are our faculty and students. (Jaschik, 2012, para. 13)

Churchill's lawyer rebutted cautioning, "the decision emboldens government officials to violate the First Amendment with impunity knowing that they cannot be sued for their disregard for the rights of citizens [and] diminishes freedom of speech for all of us" (para. 12). Adding to the comments, Cary Nelson argued that,

> [i]n affirming the astonishing idea that a University's senior administrators and Board of Regents possess quasi-judicial immunity from legal redress once a quasi-judicial campus review has taken place, [the Supreme Court] empower[ed] administrators to appoint biased review committees chosen to produce a preordained result and then stand protected by the courts. (para. 17)

He added,

> the Colorado administrators and Regents displayed precisely the opposite of judicial neutrality. They urged that Churchill be fired even before campus reviews had taken place. The Colorado court has lent its authority and approval to a corrupt process and a politically motivated result. Its decision will inevitably be cited in cases in other states. The threat to academic freedom is substantial. (para. 17)

On December 10, 2012, Churchill's lawyers filed a brief petitioning the U.S. Supreme Court for a writ of certiorari. The lawyers "argued that he was the victim of 'bad faith investigations, undertaken in retaliation for speech protected by the First Amendment.'" (Jaschik, 2013, para. 10) and "that the investigation into his speech was intended to produce a facially acceptable reason for firing him and, thus, constituted a threat of discharge" (para. 11). In their brief, the University of Colorado responded that

> The termination of a tenured professor's employment is certainly likely to provoke retaliatory lawsuits. Yet, in contrast to other settings, preventing intimidation and retaliatory lawsuits is especially important in decisions involving academic misconduct in higher education. This court has recognized that "the four essential freedoms" of a university are "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Consequently, these academic decisions receive a particular degree of deference not accorded to other government officials, and this court has cautioned, "When judges are asked to review the substance of a genuinely academic decision... they should show great respect for the faculty's professional judgment." (para. 13)

The university added

> that failure to "defer to academic judgment" on questions of academic misconduct would make it impossible for faculty panels to act without fear of constant litigation [and] that "a genuinely academic decision" by the faculty must receive deference in order to protect academic freedom. (Kruth, 2013, para. 6)

On April 1, 2013, the U.S. Supreme Court denied Churchill's petition "to hear his appeals and [his] lawyers acknowledged that this was the end of the line" (para. 1). FIRE concluded that "it is a loss for free speech that Ward Churchill has run out of legal options and that the Colorado Supreme Court has set such a dangerous precedent for future cases of retaliation against professors in Colorado" (para. 7). After five years of court battles, Ward Churchill's case is closed.

Chapter Nine: *Adams v. University of North Carolina – Wilmington*

Background

Dr. Michael S. Adams was hired by the University of North Carolina in Wilmington (UNCW) in 1993 as an assistant professor of criminology (*Adams*, 2010). Until 2000, "Adams was an atheist with liberal political beliefs" (p. 3), at which time he became a Christian and political conservative. During his initial employment, he earned numerous awards and accolades which included "strong teaching evaluations, an impressive collection of publications, outstanding peer reviews, an exemplary record of service to the department, UNCW, and the community [and] two Faculty Member of the Year awards" (p. 3), which resulted in his promotion with tenure to associate professor. He was recognized as one of the university's best instructors (*Adams*, 2010).

In 2001, Dr. Adams and UNCW faculty and students engaged in a number of confrontational email exchanges. The first exchange resulted from "the questioning of candidates for employment regarding their political preferences, and faculty members' airing anti-religious sentiments during the interview process" (pp. 3-4). Adams questioned the "propriety of basing hiring decisions on political orientation" (p. 4).

In the second exchange, Adams confronted a student for "blaming the September 11 attacks on U.S. foreign policy…calling the student's email 'bigoted, unintelligent, and immature,' but noting that the Constitution protected her writing, just as it protected his response" (p. 4). The student responded by filing a complaint, "alleging that plaintiff's email message, using university computing facilities and services, intended to intimidate and defame her, and in doing so violated the Code of Student Life and

UNCW personnel policies" (p. 4). The student demanded an investigation and access to the Adams emails to determine other exchanges Adams had regarding her email. UNCW rejected his two subsequent requests stating that "the university's position that the emails were personal and thus not subject to the student's public records request" (p. 5) and that the "decision of the University is final" (p. 5). After the student's forth request, UNCW general counsel "request[ed] that the information technology department attempt to retrieve and examine messages sent by plaintiff on the dates in question [but still] did not turn any emails over to the student, deeming them private correspondence and not public records" (pp. 5-6). No further requests were submitted by the student.

In May 2002, Adams "published a column criticizing UNCW and the department for alleged religious intolerance" (p. 6) and, in September 2003, wrote "a column for the website Townhall.com…focused on the cultural and ideological climate on university campuses, including issues of academic freedom, constitutional abuses, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism, and morality" (p. 6). The columns resulted in complaints from administrators, faculty, and potential donors citing their "lack of intellectual rigor, likened it to talk show rhetoric, and voiced their hope that the column and the controversy would quietly go away" (p. 7). Dr. Cecil Willis, the department chair at the time, asked Adams to "not discuss his online column at work as it upset the department's secretary" (p. 7). The secretary continued to read the columns and complained to the UNCW general counsel (*Adams*, 2010). Between 2001 and 2004, Adams received positive job evaluations.

An interim department chair, Dr. Diane Levy, was appointed in summer 2004. She met with Adams to voice "her concerns that his writings contained mean-spirited personal attacks directed toward the department secretary, claiming that they were hurting department collegiality" (p. 7) but Levy never demanded Adams to change his writing style or stop writing his column. Adams "defended his right to write what he wanted" (p. 7) and declined to meet with Levy, the department chair, and secretary to mediate the problem.

In 2005, Levy completed Adams' 2004 evaluation. The evaluation "cataloged his work in [the areas of] teaching, advising, research, and service" (p. 8). Levy's feedback stated that Adams "appeared to have slowed his productivity as his efforts are directed elsewhere" (p. 9). She "encouraged Adams to participate more in department affairs and suggested that to be successful he will need to increase his productivity in scholarship and publication in peer-reviewed academic outlets" (p. 9). Dr. Levy was replaced as department chair in August 2005 by Dr. Kimberly Cook.

Adams' columns continued to generate controversy in the department with two incidents occurring in 2005 and 2006. In 2005, Adams responded in his column to a letter from the Orlando Chapter of the National Organization of Women (NOW) stating that they were "'detached from reality'; 'stupid enough to think they can achieve political equality by killing their off springs'; 'irrational and hopelessly caught up in the past'; and should change their name from NOW to 'Totally Hysterical Emotional Nabobs' (THEN)" (p. 10). The column referenced Adams place of employment and job

description at the end. The column and comments were brought to the attention of UNCW.

The second incident occurred when the group Gender Mutiny Collective wrote to the Dean and Cook concerning Adams' transphobic essays. The group was concerned that he "would pass on his transphobic attitude to his law enforcement students, thus perpetuating transphobia and transphobic violence" (p. 10). The Dean responded that there had been no student complaints of the issue and "support[ed] the notion that plaintiff's discussion of transgender issues in his class, if it occurred, would fall within the ambit of academic freedom" (p. 11). UNCW considered the issue closed.

In 2006, Adams applied for promotion to full professor. To be promoted, applicants must demonstrate excellence in four areas which include (1) teaching as reflected "in teaching performance and content and in teaching activities outside the classroom" (p. 12), (2) research and artistic achievement as demonstrated by a "tangible record of professionally-reviewed substantial contribution to one's discipline" (p. 12), (3) service promotion which was defined as formal and informal professional activities on behalf of the faculty member's department, college, university, profession and the community at large" (pp. 12-13), and (4) scholarship and professional development that served to enhance "the faculty member's professional competence that reflected in the growth and improvement" of the previous three areas" (p. 13). Cook was required to make a decision in collaboration with faculty to recommend or deny promotion.

Cook solicited written comments from the faculty concerning Adams' application for promotion. One faculty reviewer commented that Adams' "production

had decreased since tenure, and…lamented the fact that all but one of plaintiff's refereed publications were co-authored [and that] peer-reviewed articles had not been published in the best or most estimable journals" (pp. 15-16). The reviewer had "difficulty recognizing [Adams] as a scholar in his field because he had not developed a national reputation in sociology, criminology, or criminal justice" (p. 16). Another reviewer indicated that his teaching was strong but that his research and service were weak noting that "he had been advised in previous years to be a more active university participant, but must have chosen to decline this activity" (p. 17). Two reviewers supported Adams promotion. One cited Adam's "consistently excellent teaching performance and tangible record of research, citing four articles since 1998 and another forthcoming" (p. 18). The second stated that Adams had "fulfilled the bare minimum of what is required at the professor rank at UNCW [but] called [Adams] research 'sporadic' and indicated that the record of [his] publications was bolstered by joint authorship" (p. 18). The last reviewer did not indicate that he would support the promotion. He commented that Adams "credentials made a somewhat weak case for promotion, and…indicated he would feel more comfortable supporting [Adams] if he were to shore up his research a bit and convince me a little more of his pedagogical skills" (p. 19). Cook circulated the criteria for promotion to all the reviewers, summarized each reviewer's comments, and called a meeting to discuss the findings.

In the September 14, 2006 meeting of the department's senior faculty, Adams' promotion was not recommended by a 7-2 vote (*Adams*, 2010). Cook, the department chair, sent the department's decision the next day to the Dean of the UNCW College of

Arts and Sciences and, within four days, prepared the memo to be sent to Adams on September 21, 2006. Adams requested the vote count to determine how close he had come to being promoted, which Cook declined to provide (*Adams*, 2010). In a memo, Cook reminded Adams of the criteria for promotion to full professor and explained that

(1) the "overriding concern regarding [his] record to date [was] in the area of scholarly research productivity…[and that it] did not demonstrate a cumulative tangible pattern of expertise in his discipline" (p. 23),

(2) his "record since his last promotion did not demonstrate a cumulative tangible pattern of expertise in the discipline, teaching…did not meet the promotion standard of 'distinguished accomplishment'" (p. 23), and

(3) his "record of service to the department, college, university and profession was insufficient for promotion" (p. 23).

Cook concluded that, "the 'overwhelming consensus' of the senior faculty was that promotion was unwarranted" (p. 23). As a result, Dr. Adams filed suit against UNCW in 2007 "alleging that UNCW retaliated against him for his Christian and politically conservative speech by denying his application for promotion to full professor and by subjecting him to intrusive investigations" (p. 2). He claimed violations of the First and Fourteenth Amendments and Title VII of the Civil Rights Act of 1964 (*Adams*, 2010).

Court Opinions and Brief

The *Adams* case began in U.S. District Court for the Eastern District of North Carolina Southern District in March 2010 and ended in the U.S. Court of Appeals for the 4th Circuit in April 2011. The courts evaluated Adams' religious claim using the

burden-shifting analysis in *McDonnell Douglas* (1973) and his First Amendment claim using the *Garcetti/Pickering* analysis in *Garcetti* (2006). The appellate court upheld the district court's religious discrimination decision to grant summary judgment immunity to the university. It remanded the district court's First Amendment decision and analysis for further review stating,

> [a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment[,] would not appear to be what *Garcetti* intended, [and is not] consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. (*Adams*, 2011, p. 25)

Each opinion and brief is discussed to provide a detailed overview of content of the case.

District Court for the Eastern District of North Carolina. In 2007, Dr. Adams received a right-to-sue letter from the EEOC and filed a lawsuit in U.S. District Court against the University of North Carolina in Wilmington (UNCW) and 16 defendants. The defendants included:

> UNCW's Chancellor, Rosemary DePaolo; twelve members of UNCW's Board of Trustees; Dr. David Cordle, Dean of the College of Arts and Sciences; Dr. Diane Levy, the former interim Chair of the Department of Sociology and Criminal Justice; and the department's current chair, Dr. Kimberly Cook. (p. 2)

Dr. Adams alleged that the "defendants retaliated against him for his Christian and politically conservative speech by denying his application for promotion to full professor and by subjecting him to intrusive investigations" (p. 2). He sought

> declarative relief and monetary damages, alleging (1) religious discrimination in violation of the Title VII of the Civil Rights Act of 1964…; (2) viewpoint discrimination and retaliation for protected speech in violation…of the First Amendment; and (3) denial of equal protection of the laws in violation…of the Fourteenth Amendment. (p. 2)

Monetary damage and Title VII claims were dismissed by the court as the defendants were acting in their official and individual capacities as public servants. Defendants moved for summary judgment on all other claims (*Adams*, 2010). The court reviewed Adams' allegation of Title VII religious discrimination, First Amendment violations of protected speech, and denial of equal protection of the law.

Prior to discussing each allegation, the court noted the "great trepidation" of the federal court in reviewing university tenure and promotion decisions and reluctance "to interfere with the 'subjective and scholarly judgments' made in reaching those decisions" (*Adams*, 2010, p. 26). As such, the court "limited [itself] to deciding whether the appointment or promotion was denied because of a discriminatory reason" (p. 26). Each concern was addressed separately.

Title VII religious discrimination. Religious discrimination under Title VII required indirect or direct evidence demonstrating that Adams had been treated differently based on his beliefs (*Adams*, 2010). Adams provided evidence from meetings and writings in which he discussed his conversion to Christianity. After a review of the evidence, the court found no evidence that would satisfy the "law's requirement of evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" (p. 27). The court added that, without evidence, Adams could still prove discrimination based on the "three-prong burden shifting analysis" which has four parts. The analysis required Adams to show:

> (1) he was a member of a protected class, (2) he applied for but was denied the promotion in question, (3) he was qualified for the promotion, and (4) he was rejected for the promotion under circumstances giving rise to an inference of unlawful discrimination. (p. 27)

The court held that Adams satisfied the first three requirements but not the fourth.

Under the fourth part, Adams failed to prove that he had been denied promotion based on his religious beliefs. Adams asserted that "he was the only religious conservative in the department, but the court stated that his "political views [were] not at issue in his Title VII claim, and he forecast[ed] no evidence that he [was] the department's only Christian" (p. 29) or that UNCW "based any of their decision on religious views or beliefs" (p. 30). The court held that, "as with [his] direct evidence argument, there [was] nothing beyond conjecture to support this inference, and [he was] therefore unable to establish a *prima facie* case of religious discrimination" (p. 30).

Adams asserted that he had satisfied all criteria for promotion and that his records resembled that of other faculty. In response, the court referred to the federal court's position in *Jimenez* (1995), acknowledging their "resistance to interfere with the 'subjective and scholarly judgments' involved in professorial employment decisions" (p. 31) or "to second-guess determinations like these, which deal entirely with the scholarly merit of professors' publications" (p. 32). Finding no evidence of discrimination, the court denied Adams' Title VII claim.

First Amendment claims. To prove a First Amendment claim, Adams had to satisfy the "three-prong test" in *McVey* (1998) and restated in *Ridpath* (2006).

> First, the public employee must have spoken as a citizen, not as an employee on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and

> efficient services to the public. Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment. (p. 33)

To satisfy the first prong, Adams had to prove that he spoke on a matter of public concern and, if so, spoke as a citizen or a public employee.

In *Garcetti* (2006), the federal court held "that, when a public employee makes a statement pursuant to his official duties, he does not speak as a citizen" (p. 34) and, therefore, is not protected by the First Amendment. As such, the court "focus[ed] not on the content of the speech but on the role the speaker occupied when he said it" (p. 34). Because Adams included his religious and conservative publications and presentations in the application materials submitted to UNCW for his promotion, the court determined that they were part of his professional duties within the "context of his promotion evaluation" (p 35). Choosing not to review these materials would have placed UNCW in the position of

> either neglecting the employee requests and refuse to look at material, fueling allegations of free speech violations grounded in the refusal; or consider the material, knowing that doing so will open them up, in the event of an adverse outcome, to claims of free speech violations for basing denials on protected speech. (p. 35)

The court held that Adams could not meet the first-prong requirements of the *McVey* test and reviewed Adams' allegation of retaliatory employment actions.

Adams claimed retaliation based on UNCW's "intrusive investigation" of his emails and alleged workplace terrorism, the defendant's "support for the addition of collegiality to the promotion criteria" (p. 36), and the defendant's investigation into the claim that he "was passing on his transphobic views to his students" (p. 36). The court determined that these claims were outside the scope of

the promotion process and that *Garcetti* (2006) did not apply. The court found that Adams failed "to forecast evidence sufficient to withstand summary judgment on the *McVey* test's requirement of a causal nexus between the speech and any of the alleged retaliatory employment actions" (p. 36). As Adams could not satisfy the requirement of the *McVey* test, the court granted summary judgment to the defendants on all First Amendment speech claims (*Adams*, 2010).

Equal Protection claim. Adams alleged that his speech and religious beliefs caused him to be treated "differently than similar situated professors" (p. 38).

> To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. (p. 38)

The court found that they had no evidence of Adams being treated differently and reiterated "their reluctance to interfere with the subjective and scholarly judgments involved in tenure and promotion decisions" (p. 38). The district court granted summary judgment to the defendants on this and all claims and, on March 15, 2010, closed the case.

Amicus brief. On July 2 2010, the American Association of University Professors (AAUP), the Foundation for Individual Rights in Education (FIRE), and the Thomas Jefferson Center for the Protection of Free Speech filed an Amicus Brief in support of Dr. Adams' academic freedom with the United States District Court for the Eastern District of North Carolina (AAUP, 2010). Amici sought to show that the District Court for the Eastern District of North Carolina incorrectly applied *Garcetti*…to this case (p. 5). In *Garcetti* (2006), the Supreme Court held "that public employees receive

no First Amendment protection when speaking pursuant to their official capacities" (p. 5) but reserved the application to faculty speech for another court to decide. Amici believed that the *Garcetti* court's reservation in applying their decision to faculty speech negated the district court's ability to apply *Garcetti* in this case. Instead, the district court should have recognized that "academic speech under the First Amendment is neither governed…nor susceptible to the 'official duties' analysis reflected in *Garcetti*" (p. 6) and relied on over 50 years of court decisions recognizing "the vital role that academic speech by college and university professors plays in our society and the First Amendment interest in that speech" (p. 6). Amici warned that the court's use of summary judgment on "Adams' First Amendment claims sets a dangerous precedent by prematurely judging the matter" (p. 6) and, therefore, requested that the appellate court hold that faculty promotion materials be guarded by the First Amendment and that the case be remanded to the lower courts for trial.

Misapplication of Garcetti (2006). The district court utilized the three-prong *McVey* test to determine whether Adams was protected. The first prong of the test, determining if the employee spoke as a citizen or a public employee, included the *Garcetti* "official duties" analysis, which required a determination as to whether the speech in question was part of employee's official duties or job responsibilities. In their analysis, the district court determined that Adams' faculty promotion materials were "expressions made within his professional duties" (p. 9), that he "spoke as an employee, not as a citizen, and that his speech therefore lacked First Amendment protection under the first prong of *McVey"* (1995) (p. 10) Amici disagreed.

Amici argued that the district court prematurely resolved the *Garcetti* (2006) reservation concerning academic speech. Their decision meant, that "a university could constitutionally penalize a faculty member not just for [their] extramural speech but for the content of all of her scholarly work" (p. 13). Amici stated that this decision rendered "faculty members at public universities vulnerable to retaliation for the content of their speech, to the ultimate detriment of the public's interest in debate, discovery, and innovation" (p. 14). Amici added that, "if allowed to stand, [the decision] would therefore create a chilling environment in which professors and students, unsure of the status of their communication, would be unable or unwilling to freely discuss and debate vital academic issues" (p. 15). Amici argued that the district court "erred in using the 'official duties' analysis in *Garcetti* (2006) to analyze First Amendment protections for academic speech and granting summary judgment in favor of the university" (p. 17) and that the court of appeals should remand the case back to the lower court for further analysis.

Threats to academic freedom. Amici argued that, based on *Garcetti* (2006), the district court's granting of summary judgment to UNCW undermined "some of the basic principles of academic freedom valued in American jurisprudence" (p. 15). Amici stated, "much of the controlling language of *Garcetti* implicitly recognizes the profound differences between academic speech by professors and other public employees, something which the court below declined to do" (p. 22). "Holding that university professors are not entitled to First Amendment protection for speech made pursuant to their role as academics would silence the very speech for which they are recruited" (p.

21). While amici endorsed the district court's "recognition of the critical role that faculty peer review plays in hiring and promotion decisions, and laud the court for its deference to properly-constituted faculty bodies" (p. 23), they "urged [the appellate] court to recognize the Supreme Court's exception for academic speech, and to remand this case to the court below for a proper analysis of the unusually complicated facts in light of precedent" (p. 24) and remand the case back to the district court.

District Court of Appeals for the Fourth Circuit. On January 26, 2011, Dr. Adams appealed the lower court's summary judgment ruling to the court of appeals. "Adams argu[ed] the grant of summary judgment to the Defendants on each of these claims was erroneous either because material facts were in dispute or the district court made substantive errors of law in analyzing the claims" (*Adams*, 2010, p. 8). The court of appeals reviewed the lower court's decision *de novo* with Chief Judge Traxler writing the opinion of the court.

Prior to his analysis, Traxler reiterated the court's reluctance to review academic employment decisions. Traxler reiterated the Supreme Court's belief that,

> if a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions--decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making. (p. 9)

and this court's belief that,

> [u]niversity employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired

> appointment or promotion. Rather, the courts review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason. (p. 8)

With these reservations, Traxler analyzed Adam's three claims of (a) religious discrimination, (b) viewpoint discrimination and retaliation for protected expression, and (c) denial of equal protection.

Religious discrimination. Adams alleged that the university violated his Title VII protection against religious discrimination by an employer. He contended he was subject "to numerous, intrusive, and harassing investigations, asking him to terminate his First Amendment activities, and refusing to promote him to full professor because of his outspoken Christian and conservative beliefs" (p. 8). The district court ruled that Adams "failed to produce any record evidence that reflected a discriminatory attitude which bore directly on the contested employment decision [or] to establish a material factual dispute under the [four-prong] burden-shifting analysis" (pp. 8-9) of *McDonnell-Douglas* (1973). On appeal to this court, Adams contended that "senior faculty's comments about his publications [provided] direct evidence that he was denied a promotion based on those views [and that he] was the only professor with his credentials to be denied a promotion to full professor in the past twenty-five years" (p. 9) as indirect evidence.

Upon review, the court of appeals denied Adam's discrimination claim. First, Judge Traxler held that Adams failed to provide direct and indirect evidence that he was treated differently based on his religion. Second, Traxler held that the district court did not err in their burden-shifting analysis, as Adams was unable to prove the fourth prong

of the test, that his promotion "was rejected under circumstances giving rise to an inference of unlawful discrimination" (p. 9). While Adams argued the he was the only "religious conservative in the department" (p. 10), he provided no direct evidence of religious discrimination or that he is "the Department's only Christian" (p. 10). Traxler asserted that all evidence was based on conjecture and that there needed to be evidence that ties the denial of the promotion to the discriminatory action of the Defendants. As such, the court found "no error in the district court's determination that the record lacked evidence to support Adams' allegations of religious discrimination [and affirmed] the district court's grant of summary judgment to the Defendants" (p. 10).

First Amendment viewpoint discrimination claim. Adams argued that the lower Court erred in granting summary judgment on his viewpoint discrimination and retaliation claim. Traxler reiterated the rights afforded each citizen by the First Amendment. He stated that "the First Amendment protects not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right" (p. 10) and utilized established First Amendment principles and case law in *Pickering* (1968), *Connick* (1983), *McVey* (1995), and *Garcetti* (2006) to guide the analysis of Adams' claim.

In *Pickering* and *Connick*, "the Supreme Court analyzed the competing interests at play between the public employee, as a citizen, in commenting upon matters of public concern and the government, as an employer, in promoting the efficiency of the public services it performs through its employees" (p. 10). The Supreme Court defined the four-prong *Pickering/Connick* balancing test to weigh the public employer's right to

regulate employee speech in the interest of maintaining an efficient and effective work place. As Adams claimed retaliation, the district court utilized a variance of the *Pickering/Connick* balance test created by the Fourth Circuit in *McVey* (1995) to determine whether the employee's speech and retaliation are directly related. The resulting three-prong *McVey* test used by the district court evaluated:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the employee's [adverse employment] decision. (p. 11)

The district court only considered the material evidence on the first prong of the *McVey* test and granted summary judgment without reviewing the remainder of the material evidence submitted by Adams on the second and third prongs. As such, the court of appeals only reviewed the evidence and decision based on the first *McVey* prong (*Adams v. UNCW*, 2011).

In their review, the district court also applied the Supreme Court's decision in *Garcetti* (2006). In that decision, the Supreme Court ruled "that when a public employee makes a statement pursuant to his 'official duties,' he does not 'speak as a citizen [and that the court] must focus not on the content of the speech but on the role the speaker occupied" (p. 11) when the speech was made. "*Garcetti* provided an additional component to the *McVey* test and the *Pickering-Connick* analysis traditionally applied in assessing whether the First Amendment protects a public employee's speech" (p. 14). Judge Traxler continued with an evaluation of the district court's application of these principles.

Judge Traxler determined that the district court had misread *Garcetti* and, therefore, had erred in granting summary judgment to the University of North Carolina at Wilmington. He stated, "Adams' speech, which the Defendants agreed was protected First Amendment speech when initially given, was converted into unprotected speech based on factors that came into play only after the protected speech was made" (p. 11). He determined that the lower court ignored the role that Adams occupied at the time the speech or writings were made and found no evidence in *Garcetti* to support the conversion of protected to unprotected speech over time. He stated, "the district court's conclusion that Adams' speech was converted from protected to unprotected speech to be error as a matter of law" (p. 12). He found that "[n]othing about listing the speech on Adams' promotion application changed Adams' status when he spoke or the content of the speech when made" (p. 11). "Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment" (p. 13). He concluded that the district court erred in applying *Garcetti* to the academic work of a public university faculty member by ignoring the Supreme Court's reservation requiring additional constitutional interests when public college and university "teachers…speak and write pursuant to…[their] official duties" (p. 13).

Instead of using *McVey* (1995) and *Garcetti* (2006), Traxler determined that Adams' speech should be evaluated based on the *Pickering/Connick* balancing test to determine whether the speech was made by a citizen on a matter of public concern

(*Adams v UNCW*, 2011). As referenced in *Pickering* (1968), "speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community [and makes irrelevant] the place where the speech occurs" (p. 13). He stated that "using the *Pickering-Connick* analysis as opposed to *Garcetti* is equally–if not more–valid in the public university setting" (p. 12). After evaluation, Traxler concluded that Adams' speech was made as a citizen on a matter of public concern as his "columns addressed topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality" (p. 13). As such, the court held that, "under the *Pickering-Adams* analysis, Adams…satisfied the first *McVey* prong as a matter of law [and that] the district court…never addressed whether the second and third prongs of the *McVey* test [were] met in this case" (p. 14). The court remanded the case for further proceeding and added that the Defendants were not entitled to qualified immunity because they, as a reasonable person, should have known Adams' was speaking as a citizen and his speech was protected (*Adams v, UNCW*, 2011).

Equal Protection. Adams claimed that "the district court erred in granting the Defendants summary judgment on his Equal Protection claim" (p. 15). The court reviewed the lower Court's decision and concluded

> that Adams' evidence creates no issue of disputed fact that the Defendants' decision to deny his promotion was the result of intentional or purposeful discrimination based on his religious beliefs, or that he was treated differently from others with whom he was similarly situated. (p. 15)

Traxler found no error in the district court granting of summary judgment to the university on this claim. In conclusion, the court of appeals remanded Adams' First Amendment claim for further proceedings and upheld the district court's ruling to grant

summary judgment to the University of North Carolina at Wilmington on Adams' religious discrimination and equal protection claims (*Adams*, 2011).

Analysis

The *Adams* case began in District Court for the Eastern District of North Carolina Southern District in March 2010 and ended in the Court of Appeals for the 4th Circuit in April 2011 (13 months). The analysis of the district court opinion, amicus brief and court of appeals opinion identified eight themes with 52, 69, and 116 coded references respectively for a total of 237 coded references. The themes, the corresponding number of coded references in each court opinion, and the total references for each theme are provided in Table 9.1. The themes are sorted by the total column from largest to smallest to illustrate a hierarchy of the most significant themes discussed across the court opinions and brief.

Table 9.1

Coded References by Theme and Court

Themes	District court	Amicus brief	Court of appeals	Totals by Theme
Expression pursuant to official job duties	12	25	42	79
Academic freedom	2	19	17	38
First Amendment	2	18	14	34
Religious discrimination	12	1	20	33
Adverse employment action	6	0	17	23
Immunity of public officials	9	1	3	13
Court's reluctance to review academic decisions	9	0	3	12
Chilling effect	0	5	0	5
Totals by court and brief	48	72	123	243

To validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all the opinions and brief. The usage of each word

was reviewed and assigned to each of the above themes. The first query scanned word frequency across all the court opinions to identify the 50 most prevalent, three or more letter keywords. Each keyword's contextual usage in each court opinion was analyzed to determine whether the individual keyword was significant or required one or more adjacent words from the opinions to improve meaning. Themes with no applicable keywords utilized the theme title or words within the title. These were added to the list of keywords or phrases. These keywords and two or more word phrases were aligned with each theme and used in a second text search query across all the opinions to determine the number of references in each court opinion and brief and compared to the theme coding hierarchy to validate them.

Of the original 50 keywords queried, 32 remained relevant to the analysis and 18 were dropped due to irrelevance, vagueness, or lack of specificity. Six of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. In addition, 10 words were defined and applied to themes that had no keywords found in the query. Twenty-four phrases consisting of keywords and adjacent words in the opinions or theme titles were also identified. Each keyword and phrase was aligned with one of the eight themes and used in the second word search query to count the number of times the words or phrases were referenced in each opinion. Each occurrence in each opinion was reviewed to eliminate redundancy and duplicity of reference counts. Where redundancy was found, the query was refined and rerun. The query results were tabulated by court opinion and brief and sorted in

descending order by the total number of references for each theme. The results are provided in Table 9.2.

Table 9.2

Keywords and Phrases Totaled Theme and Court Cases or Brief and Sorted by Theme

Themes	Key words	District court	Amicus brief	Court of appeals	Totals by Theme
Expression pursuant to official job duties	Public employee, dut*, government employee, *Garcetti* analysis, expression, promotion, application, supplementary materials, employment decisions	143	70	100	313
Academic freedom	Academic freedom, special concern, academic speech, academic expression, speech related to scholarship, academic scholarship, teaching	39	52	36	127
First Amendment	First Amendment, protected speech, speaking as a citizen, free speech, public concern, right*	15	49	47	111
Religious discrimination	Anti-religious, discrimination, bigotry, intolerance, viewpoint retaliation, burden-shifting analysis, Fourteenth Amendment, Equal Protection	31	4	40	75
Immunity of public officials	Summary judgment, matter of law, immun*	13	8	25	46
Adverse employment action	Adverse, retaliat*, terminat*	14	7	22	43
Courts reluctance to review academic decisions	Reluctan*, wary, second-guess	4	0	3	7
Chilling effect	Chill, silence	0	2	0	2

The theme rankings in Table 9.1 and 9.2 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in tables, the four most prevalent

themes were expression pursuant to official job duties, academic freedom, First Amendment, and religious discrimination. To determine the linear relationship between each of these themes, a Pearson correlation coefficient of word similarity was calculated as shown in Table 9.3. The highest correlations were between the expression pursuant to official job duties and academic freedom themes (0.91559) and the expression pursuant to official job duties and First Amendment themes (0.88969).

Table 9.3

Pearson Correlation Coefficients for the Prevalent Themes

Theme	Expression pursuant to official job duties	Academic freedom	First Amendment	Religious discrimination
Expression pursuant to official job duties	1.00000	0.91559	0.88969	0.70552
Academic freedom	0.91559	1.00000	0.87904	0.61515
First Amendment	0.88969	0.87904	1.00000	0.60027
Religious discrimination	0.70552	0.61515	0.60027	1.00000

The prevalent themes are discussed based on the order provided in Table 9.4. A line graph of Table 9.4's coded references by opinion and brief is provided in Figure 9.1.

Table 9.4

Number of Coded References in Prevalent Themes by Court Opinion and Brief

Themes	District court	Amicus curiae brief	Court of appeals	Total by theme
Expression pursuant to official job duties	12	25	42	79
Academic freedom	2	19	17	38
First Amendment	2	18	14	34
Religious discrimination	12	1	20	33

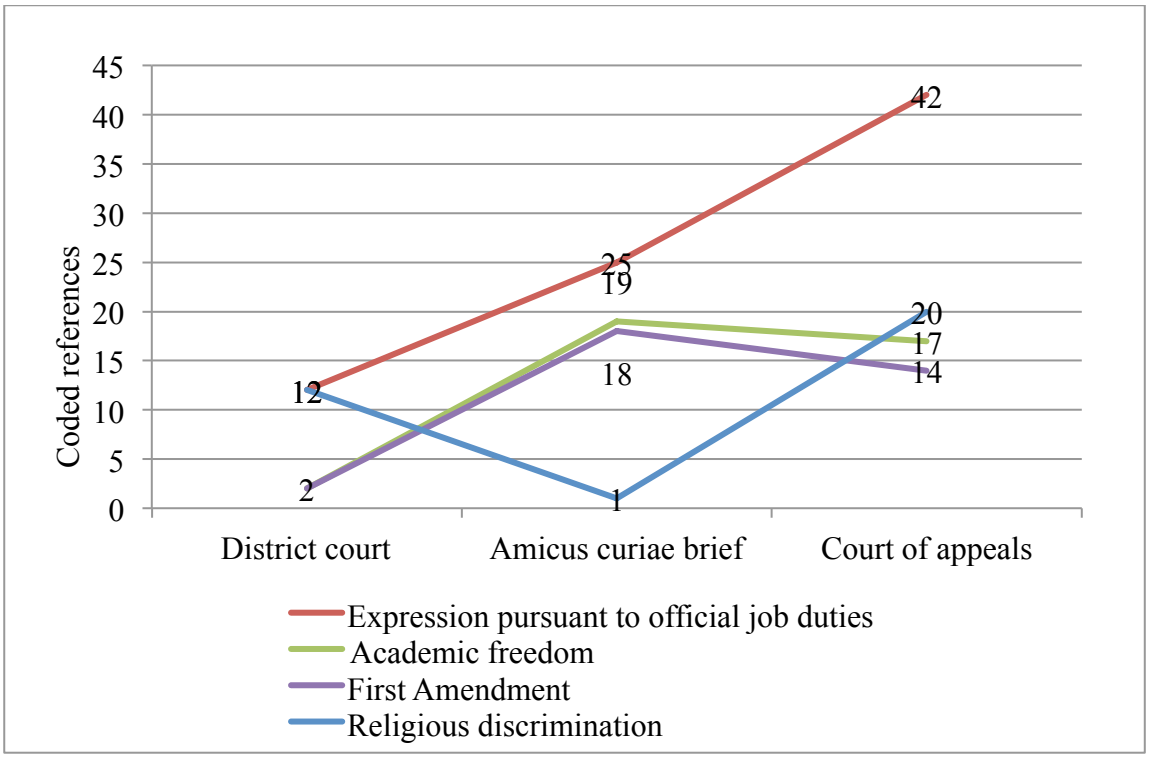


Figure 9.1. Four Most Prevalent Themes Based on Coded References

Expression pursuant to official job duties. The dominant theme was expression pursuant to official job duties. The theme focused on whether the promotion file and materials that Adams submitted to the university are protected by the First Amendment and academic freedom or, based on the *Garcetti* analysis, unprotected as it was part of Adams' official duties. Seventy-nine references were coded from the opinions and brief with 12, 25, and 42 in the district court, amicus curiae brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the academic freedom, First Amendment, adverse employment action, and religious discrimination themes 22,

15, 9, and 8 times respectively. Table 9.5 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the expression pursuant to official job duties theme.

Table 9.5

Matrix Coding of the Four Prevalent Themes That Overlap the Expression Pursuant to Job Duties Theme

Themes	District court	Amicus curiae brief	Court of appeals	Total
Academic freedom	2	10	10	22
First Amendment	1	7	7	15
Adverse employment action	1	0	8	9
Religious discrimination	2	0	6	8

District court. The university motioned the district court for summary judgment, which required testing whether the university's actions and retaliation against Adams violated his rights. To decide, the district court used the first-prong of the *McVey* test to determine whether Adams spoke on a "matter of public concern" and, if so, whether he was speaking as a citizen or an employee.

> In this case, [Adams'] retaliation claim is rooted in his columns, publications, and presentations, many of which criticized defendants, other UNCW administrators or staff, or the university as a whole, and others of which dealt with controversial material and reflected plaintiff's conservative views. The novelty of this claim (and the entire case) comes from the fact that plaintiff included these materials in his application seeking promotion, thus forcing the very people he criticized to make professional judgments about this speech. (p. 33)

The court stated that Adams' "inclusion of the speech in his application for promotion trumped all earlier actions and marked his speech, at least for promotion purposes, as

made pursuant to his official duties" (p. 35). The district court was reminded of the federal court's "reluctance…to interfere with the 'subjective and scholarly judgments' involved in tenure and promotion decisions" (p. 38) and of their "reticence and restraint in reviewing such decisions" (p. 26). As such, Adams could not satisfy the first prong of the *McVey* test and granted the university summary judgment.

Amicus brief. Amici argued, "[t]he district court's decision could destroy First Amendment protection for all speech made by university professors pursuant to what the court deems to be their official duties" (AAUP, 2010, p. 7). Based on *McVey* and *Garcetti*, amici repeated the district court's position that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the constitution does not insulate their communications from employer discipline." (p. 9) They added the district court's determination that,

> because [Adams] included his online column and book in his application for promotion,…they were expressions made within his professional duties and were therefore created as an employee, not a citizen [which] trumped all earlier disclaimers by Adams and others that his included works were not related to his job. (p. 9)

Amici contended that the district court erred, "when it disregarded the Supreme Court's clear reservation [in *Garcetti*] of speech related to scholarship or teaching and instead applied the Court's 'official duties' analysis to Adams' speech" (p. 12). If the decision is upheld, amici warned a "university could constitutionally penalize a faculty member not

just for [his or her] extramural speech but for the content of all of [his or her] scholarly work" (p. 13) and would leave "faculty members at public universities vulnerable to retaliation for the content of their speech, to the ultimate detriment of the public's interest in debate, discovery, and innovation" (p. 14). This resolution would resolve the Supreme Court's reservation in *Garcetti* and mean that faculty intramural and extramural speech is not protected.

Amici argued, "the district court confused the capacity in which [Adams] speech was created…with the purpose for which the speech was submitted…in holding that Adams' inclusion of the speech in his application trumped all earlier acts or statements characterizing the speech" (p. 14). In doing so, the court "used different analyses of Adams' role as 'citizen' or 'employee' to evaluate different allegedly retaliatory actions, making the categorization of Adams as 'citizen' or 'employee' dependent upon the university's actions [and] the circumstances under which it is later read" (pp. 14-15). Amici contended, the decision would "create a chilling environment in which professors and students, unsure of the status of their communication, would be unable or unwilling to freely discuss and debate vital academic issues" (p. 15). Adding, "[t]his standard simply cannot apply to those who are responsible for fostering knowledge, exploration, and even dissent" (p. 16). Because "much of the controlling language of *Garcetti* implicitly recognize[d] the profound differences between academic speech by professors and other public employees" (p. 22), amici requested the court to recognize its error "in using the 'official duties' analysis in *Garcetti* to analyze First Amendment protections

for academic speech and granting summary judgment in favor of the university" (p. 21) and remand the case to the district court for more analysis.

Court of appeals. The court of appeals discussed whether the district court erred in granting summary judgment to the university based on the court's finding that Adams' expression was made as part of his official duties as a faculty member. Presiding Judge Agee found that the district court misread *Garcetti*. Agee stated,

> [the] district court's decision rests on several fundamental errors including its holding that protected speech was converted into unprotected speech based on its use after the fact [and that] the district court applied *Garcetti* without acknowledging…the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university. (p. 19)

Agee discussed each error and the effect of upholding the district court's decision.

Agee argued that Adams' role before and after his promotion application did not change and, therefore, the First Amendment protection of his writings and publications submitted with his promotion application should not have changed either. Agee stated, "nothing about listing the speech on Adams' promotion application changed Adams' status when he spoke or the content of the speech when made" (p. 21). He disagreed with the district court's conclusion that universities would be in a "Catch-22" of

> either neglect[ing] employee requests and refus[ing] to look at material, fueling allegations of free speech violations grounded in the refusal; or consid[ing] the material, knowing that doing so will open them up, in the event of an adverse outcome, to claims of free speech violations for basing denials on protected speech. (p. 21)

Agee rebutted, "[t]his bind is no different than the commonplace consideration of criteria that govern all university employment decisions" (p. 21). Accordingly, Agee concluded that the district court erred as a matter of law in converting Adams' speech.

Agee argued that, based on the facts of the case, *Garcetti* should not apply "in the academic context of a public university" (p. 22). Reminding the court of Justice Souter's dissenting opinion in *Garcetti*, Agee stated, "the plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play" (p. 23). He added,

> [a]ppying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. (p. 24)

Agee found that "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields" (p. 25). For this reason, he concluded that there was insufficient evidence to show that Adams' speech was tied to his official duties and remanded the case for further proceedings.

Academic freedom. The academic freedom theme focused on whether Adams's academic freedom was violated when the university allegedly retaliated against him. Thirty-eight references were coded from the opinions and brief with 2, 19, and 17 in the district court, amicus curiae brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, First Amendment, court's reluctance to review academic decisions, and chilling effect themes 22, 7, 3, and 2 times respectively. Table 9.6 provides the results of the query for each opinion and

brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the academic freedom theme.

Table 9.6

Matrix Coding of the Four Prevalent Themes That Overlap the Academic Freedom Theme

Themes	District court	Amicus curiae brief	Court of appeals	Total
Expression pursuant to official job duties	2	10	10	22
First Amendment	0	5	2	7
Courts reluctance to review academic decisions	1	0	2	3
Chilling effect	0	2	0	2

District court. The district court reiterated the federal court's reluctance to be involved in an academic decision such as tenure. Based on *Jimenez* (1995) and *Smith* (1980), Judge Malcolm Howard stated, "[c]ourts do not sit as a 'super personnel council' to review these decisions…and they are reluctant to interfere with the 'subjective and scholarly judgments' made in reaching those decisions" (*Adams*, 2010, p. 26). He continued that these decisions "must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges" (p. 26). He, also, found that, if these decisions required the university to review Adams' emails as part of their investigation, the university was within its discretion to do so. Finding that the university had done everything in their power to protect Adam' speech rights, Howard determined that there was no "evidence to support [Adams'] contention that the university's eventual review

of [his] and others' email messages bore any relationship to his protected speech" (p. 36-37). He awarded summary judgment to the university on Adams' religious discrimination and First Amendment claims and entrusted academic decisions to the university.

Amicus brief. Amici argued that the district court misapplied *Garcetti* and ignored the Supreme Court's reservation concerning "the more complex question of protection of academic speech" (AAUP, 2010, p. 5). Amici argued, "[t]he illogical application of *Garcetti* to this case undermines some of the basic principles of academic freedom, a freedom that is 'of transcendent value to all of us and not merely the teachers concerned'" (pp. 6-7). They stated,

> [t]he court's decision, while mistakenly relying upon *Garcetti*, simultaneously suggested that all materials included in a promotion or tenure packet would be unprotected by the First Amendment. A university could constitutionally penalize a faculty member not just for [his or her] extramural speech but for the content of all of [his or her] scholarly work. (p. 13)

Adding,

> [t]his approach has the potential to curb academic development by setting a precedent that protection for expression – whether spoken in an official capacity or in an unofficial capacity on matters of public concern – shifts depending upon the circumstances under which it is later read. (pp. 14-15)

In taking this approach, the district court assumed "that academic expression is no different from any other public employee speech, without discussing the reasoning behind its logic" (p. 16). Amici contended that this approach "would strip away First Amendment protection for speech made by university professors "pursuant to their 'official duties'" (p. 21) and "stifle a professor's ability to speak candidly and fearlessly"

(p. 22). As such, amici asked the court to recognize the Supreme Court's reservation in *Garcetti* and to remand the case for further analysis.

Court of appeals. The court of appeals reviewed Adams claims within the context in which he spoke and the district court's use of the *Garcetti* analysis. Judge Agee reiterated *Ewing* (1985) stating, "courts have been reluctant to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their academic freedom, a special concern of the First Amendment" (*Adams*, 2011, p. 12). He added that he was

> [u]nsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved [as] the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. (p. 12)

Within this context, Agee analyzed the district court's decision concerning Adams' role when we spoke and his First Amendment rights to speak in that role.

Agee agreed with the district court that they had made their decision based on the correct precedent but argued that they had "ignored the role Adams occupied when he spoke" (p. 20). Agee stated,

> [i]in effect, the district court held that Adams' speech in his columns, books, and commentaries, although undoubtedly protected speech when given, was somehow transformed into unprotected speech because…others read the same items from a different perspective long after Adams' speech was uttered. (p. 20)

While *Garcetti* specifically requires evaluation of the speaker's role, Agee stated that there was "nothing about listing the speech on Adams' promotion application [that] changed [his academic] status when he spoke or the content of the speech when made" (pp. 20-21). Agee continued with a discussion of *Garetti*'s applicability to the case.

Agee stated that the court was "persuaded that *Garcetti* would not apply in the academic context of a public university…based on the clear reservation of the issue…and the aspect of scholarship and teaching reflected by Adams' speech" (p. 22). Agee recognized that "[t]here may be instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching" (p. 24).

> But, [amici added], the scholarship and teaching in this case, Adams' speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams' assigned teaching duties at UNCW or any other terms of his employment found in the record [which, as the university conceded, also was not] undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties. (p. 24)

Applying the *Garcetti* analysis in this case, Agee concluded, was not what the Supreme Court intended and, if upheld, "could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during [his or her] employment" (p. 24). Agee concluded that the "thin thread [was] insufficient to render Adams' speech 'pursuant to [his] official duties' as intended by Garcetti" (p. 25) and reversed the district court's decision on Adams' First Amendment claim.

First Amendment. This theme focused on Adams' right to speak and write freely as a citizen and professor and to submit his scholarly works during the promotion process without the fear of retaliation. Thirty-four references were coded from the opinions and brief with 2, 18, and 14 in the district court, amicus curiae brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands within the opinions and brief, the theme overlapped the expression pursuant to official job duties, academic freedom, religious discrimination, and chilling

effect themes 15, 7, 3, and 2 times respectively. Table 9.7 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the First Amendment theme.

Table 9.7

Matrix Coding of the Four Prevalent Themes That Overlap the First Amendment Theme

Themes	District court	Amicus curiae brief	Court of appeals	Total
Expression pursuant to official job duties	1	7	7	15
Academic freedom	0	5	2	7
Religious discrimination	0	1	2	3
Chilling effect	0	2	0	2

District court. The district court reiterated *Garcetti*, stating, "the First Amendment does not shield the consequences of expressions employees make pursuant to their professional duties" (*Adams*, 2010, p. 34). Judge Howard determined that Adams' "inclusion of his columns, publications, and presentations in his application for promotion [was] an implicit acknowledgement that they were expressions made pursuant to his professional duties [and] that he was acting as a faculty member when he said them" (p. 34). He added that this "trumped all earlier actions and marked his speech, at least for promotion purposes, as made pursuant to his official duties" (p. 35). To think otherwise, he contended,

> would allow those in [Adams'] position to place employers in a double bind: either neglect employee requests and refuse to look at material, fueling allegations of free speech violations grounded in the refusal; or consider the material, knowing that doing so will open them up, in the event of an adverse outcome, to claims of free speech violations for basing denials on protected speech. (p. 35)

Based on *Garcetti*, Howard found that the materials submitted in Adams' promotion and tenure application were part of his job responsibilities as a faculty member and not protected under the First Amendment.

Amicus brief. Amici discussed the First Amendment within the context of the Supreme Court's recognition of academic freedom as a special concern and reservation to apply *Garcetti* in the academic environment. Amici referenced *Rodriguez* (2010) stating,

> [t]he right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities – sheltered from the currents of popular opinion by tradition, geography, tenure, and monetary endowments – have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale. (p. 20)

Amici argued that the district court's "holding that university professors are not entitled to First Amendment protection for speech made pursuant to their role as academics would silence the very speech for which they are recruited" (p. 21). Adding,

> [b]ecause of the critical role that the academic community plays in educating the public and expanding the scope of human knowledge, the boundaries around protected speech must be broad so as to not chill the public discourse. These critical First Amendment rights can be vindicated only through access to the courts. (p. 23)

As such, amici requested the court to remand the case for analysis in light of "the reservation for academic speech articulated in the majority's opinion in *Garcetti*" (p. 24).

Court of appeals. The court of appeals reviewed Adams' claim that "the district court erred in granting summary judgment to the [university] on his First Amendment

retaliation and viewpoint discrimination claims" (*Adams*, 2011, p. 17). After review, Judge Agee found that the district court erred "in its conclusion that Adams' speech, which the [university] agree[d] was protected First Amendment speech when initially given, was converted into unprotected speech based on factors that came into play only after the protected speech was made" (p. 20). He also did not "find any support in *Garcetti*, which focused on the nature of the employee's speech at the time it was made" (p. 20) and, therefore, was not compelled to extend the *Garcetti* principles to the case. He stated that,

> [applying them] to the academic work of a public university faculty member…could place beyond the reach of First Amendment protection many forms of public speech or service a professor engages in during his employment [which is not] what *Garcetti* intended [or] consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. (p. 24)

As such, Agee determined that the university's

> arguments…rest[ed] on the same fallacy engaged by the district court, and focus[ed] not on the nature of Adams' speech at the time it was made, but on his inclusion of those materials in the 'private' context of his promotion application. (p. 26)

He found that Adams spoke as a citizen on a matter of public concern and his speech was, therefore, protected by the First Amendment.

Religious discrimination. The religious discrimination theme focused on the committee's retaliation against Adams for his religious and political writings by denying his promotion (*Adams*, 2010). Thirty-three references were coded from the opinions and brief with 22, 1, and 20 in the district court, amicus curiae brief, and court of appeals respectively. Based on a matrix coding query of all themes and reference coding bands

within the opinions and brief, the theme overlapped the expression pursuant to official job duties, adverse employment action, First Amendment, immunity of public officials, and court's reluctance to review academic decisions 8, 4, 3, 2, and 2 times respectively. Table 9.8 provides the results of the query for each opinion and brief. The analysis includes examples from each court opinion and brief showing how these four themes relate to the religious discrimination theme.

Table 9.8

Matrix Coding of the Four Prevalent Themes That Overlap the Religious Discrimination Theme

Themes	District court	Amicus curiae brief	Court of appeals	Total
Expression pursuant to official job duties	2	0	6	8
Adverse employment action	0	0	4	4
First Amendment	0	1	2	3
Immunity of public officials	2	0	0	2
Courts reluctance to review academic decisions	2	0	0	2

District court. The district court reviewed Adams' Title VII claim that the university "retaliated against him for his Christian and politically conservative speech by denying his application for promotion to full professor and by subjecting him to intrusive investigations" (*Adams*, 2010, p. 2). Judge Howard stated, "[t]o prove his Title VII claim, [Adams] must demonstrate that UNCW treated him differently than other employees because of his religious views or beliefs [and provide] evidence whose cumulative probative force supports a reasonable inference of discrimination" (p. 27). As evidence, Adams' stated,

> he spoke of his conversion to Christianity several times prior to his promotion application, including in columns and a book that he submitted as part of his promotion application. From this he surmise[ed] that the [university's] consideration of these materials (at Adams' behest) as part of his promotion application and the subsequent denial together constitute[ed] direct evidence of discrimination. (p. 27)

Howard found that the evidence did "not satisfy the law's requirement of evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" (p. 27).

Lacking evidence, Howard conjectured that Adams could still prevail on his claim using the three-part burden-shifting analysis in *McDonnell Douglas* (1973). The analysis required: (a) Adams to establish "a prima facie case for religious discrimination" (*Adams*, 2010, p. 28); (b) the university to "proffer legitimate, non-discriminatory reasons for the [promotion] denial" (p. 30); and (c) Adams to "show that the [university's] proffered reasons were merely pretext for unlawful religious discrimination" (p. 30). The first part of the analysis required Adams to satisfy four steps.

> (1) he was a member of a protected group, (2) he applied for but was denied the promotion in question, (3) he was qualified for the promotion, and (4) he was rejected for the promotion under circumstances giving rise to an inference of unlawful discrimination. (p. 28)

Howard found that Adams was a member of a protected group, denied promotion, and qualified as an associate professor to be promoted. On the fourth step, Adams argued, "he meets this criterion because he was the 'only Christian conservative' in the department" (p. 29). Howard found no evidence supporting Adams' assertion or establishing "an arguable link to [his alleged] religious discrimination" (p. 29). He

added, “there [was] nothing beyond conjecture to support this inference, and [Adams was] therefore unable to establish a prima facie case of religious discrimination” (p. 30). Even if Adams were to satisfy the first and second part of the analysis, Howard added that his “claim bumps up against the federal courts’ resistance to interfere with the ‘subjective and scholarly judgments’ involved in professorial employment decisions” (p. 31). In conclusion, Howard granted summary judgment to the university on Adams’ Title VII claim.

Amicus brief. Amici focused on Adams’ First Amendment claims and the effect upholding the district court’s decision would have on academic freedom and university speech. Amici referenced Adams’s Title VII claim in an opening statement but took no position on Adams’ religious discrimination claim.

Court of appeals. Judge Agee agreed with the district court’s decision. He found that Adams “failed to set forth direct evidence of religious discrimination…and his arguments demand pure speculation” (*Adams*, 2011, p. 14). Agee also found that the “district court properly held that Adams failed to satisfy his burden for proving discrimination using the burden-shifting analysis of *McDonnell Douglas* (1973). As such, Agee concluded that the district court did not err in “their determination that the record lacked evidence to support Adams’ allegations of religious discrimination” (*Adams*, 2011, p. 17) and affirmed the district court’s decision to grant the university summary judgment.

Summary

While the university was granted summary judgment on Adams' claims of religious discrimination and Equal Protection, the court of appeals remanded Adams' First Amendment retaliation and viewpoint discrimination claim to the district court for further proceedings. The court of appeals reasoned,

> (1) the district court erred in concluding that his speech, which was protected speech when initially given, was converted into unprotected speech when he listed the speech on his promotion application, and (2) under the Pickering-Connick analysis, his speech was clearly that of a citizen speaking on a matter of public concern since his columns addressed topics such as academic freedom and civil rights. (*Adams*, 2011, p. 2)

The court of appeals concluded that the district court's misread *Garcetti* based on two overriding principles. First, the district court's decision insinuated "that protected speech was converted into unprotected speech based on its use after the fact" (p. 19). The court of appeals found "no precedent for the phenomenon of converting protected speech" (p. 20) or support in the *Garcetti* analysis that "changed Adams' status when he spoke or the content of the speech when [it was] made" (p. 21). In examining the content of Adams' speech without analyzing the context in which it was given, the court of appeals held that the district court erred as matter of law.

Second, the court of appeals reasoned that, "the district court applied *Garcetti* without acknowledging…the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university" (p. 19). The court stated that "[t]he plain language of *Garcetti*…explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play" (p. 23). If allowed to stand, the district court's decision

> could place beyond the reach of First Amendment protection many forms of public speech or service a professor engag[es] in during [his or her] employment [which is not]consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. (p. 24)

While the university contended that Adams' speech was part of his official duties as a faculty member, the district court found that Adams' "speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields" (p. 25). Based on the Supreme Court reservation in *Garcetti*, the court of appeals held that its' analysis should not be used to evaluate Adams' speech.

The court of appeals instead used the *Pickering/Connick* balancing test. In using the test, the court of appeals found that Adams' columns provided in his promotion application included "topics such as academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion, and morality," (p. 26) and that his speech was made as a citizen on matters of public concern not as part of his official duties. The court of appeals' recognition of the Supreme Court's reservation in *Garcetti* and the role that faculty hold when they speak is significant as it provides protection for faculty's academic freedom as well as guidance to universities when faculty speech as a citizen conflicts with their speech as an employee.

On September 6, 2011, the district court sent the university and Adams to mediation. The university responded stating that

> UNCW will, in good faith, participate in the routine settlement conference, which was ordered by the United States District Court for the Eastern District of North Carolina in *Adams v. UNCW*, in an effort to determine whether a mutually acceptable agreement is possible. (Pyron, 2011, para. 6)

As of this writing, no information was found concerning a settlement, but Adams has received promotion to Associate Professor in the Sociology and Criminology department at the University of North Carolina at Wilmington.

Chapter Ten: Summary of Cases

Chapter 10 summarizes the findings in the six court cases analyzed. The chapter presents the court case decisions and timelines and discusses the prevalent themes identified during the analysis of the six cases. The chapter concludes with a discussion of the findings.

Case Timeline

The six cases for this study were argued and decided between 2000 and 2012 in the district and appellate courts, except for *Grutter* and *Garcetti,* which went to the U.S. Supreme Court. In *Grutter*, motions to combine the case with *Gratz* and to allow defendant intevenors were filed in the 6th circuit district and appellate courts starting in August 1998. The case was decided by the 6th circuit in March 2001 and the U.S. Supreme Court in June 2003. Similarly, *Garcetti* was decided in the 9th circuit district and appellate courts and in the U.S. Supreme Court in May 2006. The *Churchill* case was the most drawn out of the six cases lasting 70 months and filed in three 9th circuit courts including the district, appellate, and Colorado supreme courts as well as the U.S. Supreme Court. *Adams* was the shortest case lasting 16 months and filed in two courts in the 10th circuit. As indicated in Table 10.1, all cases were decided in favor of the government agency or public university but *Adams*. *Adams* received a partial decision and his case was remanded to the district court for further proceedings. The district court referred his case to mediation and it was settled out of court. A shepardized list of the six cases studied is provided below in the order that they were studied to show prior precedents, current case law, and validate the case citations.

- *Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), reversed, 309 F.3d 329 (6th Cir. 2001), affirmed, 539 U.S. 306 (2003).*
- *Ceballos v. Garcetti*, 2002 WL 34098285, No. CV-001-11-06-AHMAJWX, (C.D. Cal. Jan. 30, 2002), *reversed,* 361 F.3d 1168 (9th Cir. 2004), *reversed,* 547 U.S. 410 (2006).
- *Schrier v. Univ. of Colorado, 427 F.3d 1253 (10th Cir. 2005).*
- *Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), affirmed 403 Fed. Appx. 236 (9th Cir. 2010).*
- *Churchill v. Univ. of Colorado at Boulder*, 293 P. 3d 16 (Colo. App. 2010), *affirmed on other grounds,* 285 P.3d 986 (Colo. 2012).
- *Adams v. Univ. of North Carolina*, 640 F. 3d 550 (4th Cir. 2011), cert. denied, 131 S. Ct. 233 (2010).

Table 10.1 also provides the circuit courts in which the cases originated and indicates whether the case went to the Supreme Court.

Table 10.1

List of the six cases studied showing the circuit court in which the case originated, whether the case was heard by the Supreme Court, and who the court decided in favor of

Cases	District Court	U.S. Supreme Court	Decision
Grutter v. Bollinger	6th Circuit	Yes	University of Michigan
Garcetti v. Ceballos	9th Circuit	Yes	County district attorney's office
Schrier v. University of Colorado	10th Circuit	No	University of Colorado
Hong v. University of California	9th Circuit	No	University of California
Churchill v. University of Colorado	10th Circuit	Appealing	University of Colorado
Adams v. University of North Carolina at Wilmington	4th Circuit	No	Mediated and settled

Table10.2 depicts the timelines for each of the cases, the start and end dates of each case, and the amount of time that each case was litigated.

Table 10.2

Case timelines: 2000 to 2012

Years	*Grutter*	*Garcetti*	*Schrier*	*Hong*	*Churchill*	*Adams*
2000	August 1998					
2001						
2002		January				
2003	April-June		May			
2004						
2005		October				
2006		May	December			
2007				September	July	
2008						
2009						
2010				November		March
2011						April
2012					September	
2013					April	
Months in court	59	53	44	39	70	16

Note. Table cells indicate the start and end months and year of each case. Red cells indicate that the case was in the district court system and blue in the Supreme Court. The start of the timeline coincides with the start of the study.

Case Theme Analysis

Of the 35 themes coded in the six cases, 11 themes were coded in more than one case and identified as prevalent to the cross-case analysis. The remaining 24 themes were dropped from the analysis because they were coded in one case and only relevant to the discussion of that specific case. The 11 prevalent themes from the case analysis included the First Amendment, expression pursuant to official job duties, immunity of public officials, academic freedom, adverse employment action, matter of public concern, speech as a public versus private citizen, employer's right to control speech,

reinstatement to university, employer's right to efficient operations, and chilling effect. The 11 themes had 1,356 coded references, which are listed in Table 10.3.

Table 10.3

Prevalent Themes With the Cases Referenced and Total References Coded

Prevalent Themes	Cases Referenced	Total Coded References
First Amendment	*Garcetti, Schrier, Hong, Churchill, Adams*	272
Expression pursuant to official job duties	*Garcetti, Hong, Adams*	254
Immunity of public officials	*Grutter, Garcetti, Schrier, Hong, Churchill, Adams*	224
Academic freedom	*Grutter, Garcetti, Schrier, Churchill, Adams*	155
Adverse employment action	*Garcetti,Churchill, Adams*	104
Speech as a public employee versus private citizen	*Garcetti, Schrier*	77
Matter of public concern	*Garcetti, Schrier, Hong,*	75
Employer's right to control speech	*Garcetti, Hong,*	75
Reinstatement to university	*Schrier, Churchill*	58
Employer's right to efficient operations	*Garcetti, Schrier*	32
Chilling effect	*Churchill, Adams*	30

As the cases were analyzed, the 11 themes were tracked in order to highlight the courts' opinions and to identify trends across the timeline of the study. Figure 10.1 illustrates the prominence of each theme from 2000 to 2012 as well as the date the courts made their final decision on each case. Noteworthy, is the increased importance of the speech as a public employee versus private citizen until *Garcetti* was decided, in 2006. Starting in 2006 and continuing to present, the importance of the expression pursuant to job duties theme is prominent. Also, starting in 2009, there was an increase in the number of references for the immunity of public officials theme. These trends reflect the

courts' reluctance to be involved in university business and academic decisions, their designation of faculty as public employees, and the universites' ability to use these decisions to determine what academic speech is part of a faculty member's job duties and what can be controlled in the name of maintaining efficient operations.

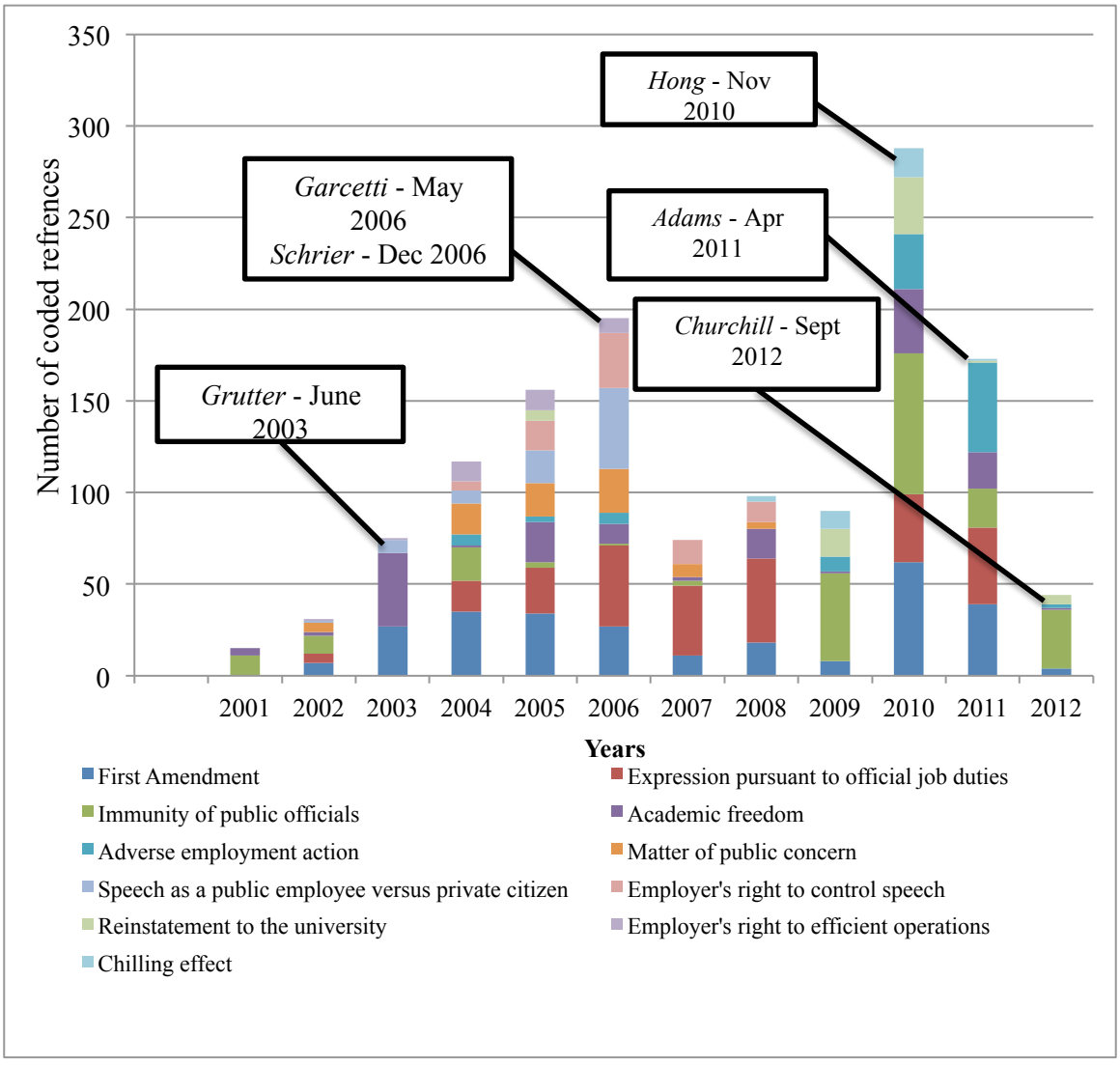


Figure 10.1. Theme Trends and Case Decisions Since 2000

To determine the strength of the linear relationship between each of these themes, a Pearson correlation coefficient (r) of word similarity was calculated. Table 10.4 provides the prevalent themes with strong positive relationships (above r = 0.90).

Table 10.4

Pearson Correlation Coefficient of the Strongest Linear Relationships (r <= 0.90) Between the 11 Most Prevalent Themes in the Six Cases

Theme A	Theme B	Pearson correlation coefficient
Expression pursuant to official job duties	Employer's right to control speech	0.95744
Speech as a public employee versus private citizen	First Amendment	0.95613
First Amendment	Expression pursuant to official job duties	0.95586
Speech as a public employee versus private citizen	Employer's right to control speech	0.95331
Speech as a public employee versus private citizen	Matter of public concern	0.95044
First Amendment	Academic freedom	0.94413
First Amendment	Employer's right to control speech	0.94138
Speech as a public employee versus private citizen	Expression pursuant to official job duties	0.93909
Matter of public concern	First Amendment	0.93439
Matter of public concern	Expression pursuant to official job duties	0.92734
Matter of public concern	Employer's right to control speech	0.92634
Expression pursuant to official job duties	Academic freedom	0.92460
Matter of public concern	Employer's right to efficient operations	0.91578
Speech as a public employee versus private citizen	Academic freedom	0.90439
Chilling effect	Adverse employment action	0.90143

The correlations for themes between r > 0.80 and r < 0.00 are provided in Table 10.5. The correlation between the reinstatement to university and immunity of public officials

themes and the other prevalent themes was low ($r > 0.80$). No correlation ($r = 0.00$) existed between the immunity of public officials theme and any other prevalent themes demonstrating that the court's willingness to discuss and consider immunity independent of other themes and factors in the cases.

Table 10.5

Pearson Correlation Coefficient for Weakest Linear Relationships

($r > 0.80$ and $r < 0.00$) Between the 11 Most Prevalent Themes in the Six Cases

Theme A	Theme B	Pearson correlation coefficient
Reinstatement to university	Adverse employment action	0.79198
Employers Right to Efficient Operations	Chilling effect	0.78388
Reinstatement to the university	Academic freedom	0.78063
Reinstatement to the university	First Amendment	0.77894
Reinstatement to the university	Chilling effect	0.75756
Reinstatement to the university	Expression pursuant to official job duties	0.74851
Reinstatement to the university	Employer's right to control speech	0.71947
Speech as a public employee versus private citizen	Reinstatement to the university	0.71011
Reinstatement to the university	Matter of public concern	0.69021
Reinstatement to the university	Employer's right to efficient operations	0.68564

Analyzing the 11 prevalent themes from 2000 to 2012 contributes to answering the study's research question: *How have federal, state, and local events affected academic freedom since 2000?* The six cases studied provide a chronology of the legal decisions made that affect academic speech on campuses. Each case will be discussed within the context of the prevalent themes in order to identify trends and to determine each case's contribution to the study. To illustrate this relationship, Figure 10.2 provides

a stacked bar chart of the 11 prevalent themes and within each, the number of coded references in each case. Each case and the prominent themes are discussed to identify trends and the effect each court decision has had on the academic freedom since 2000.

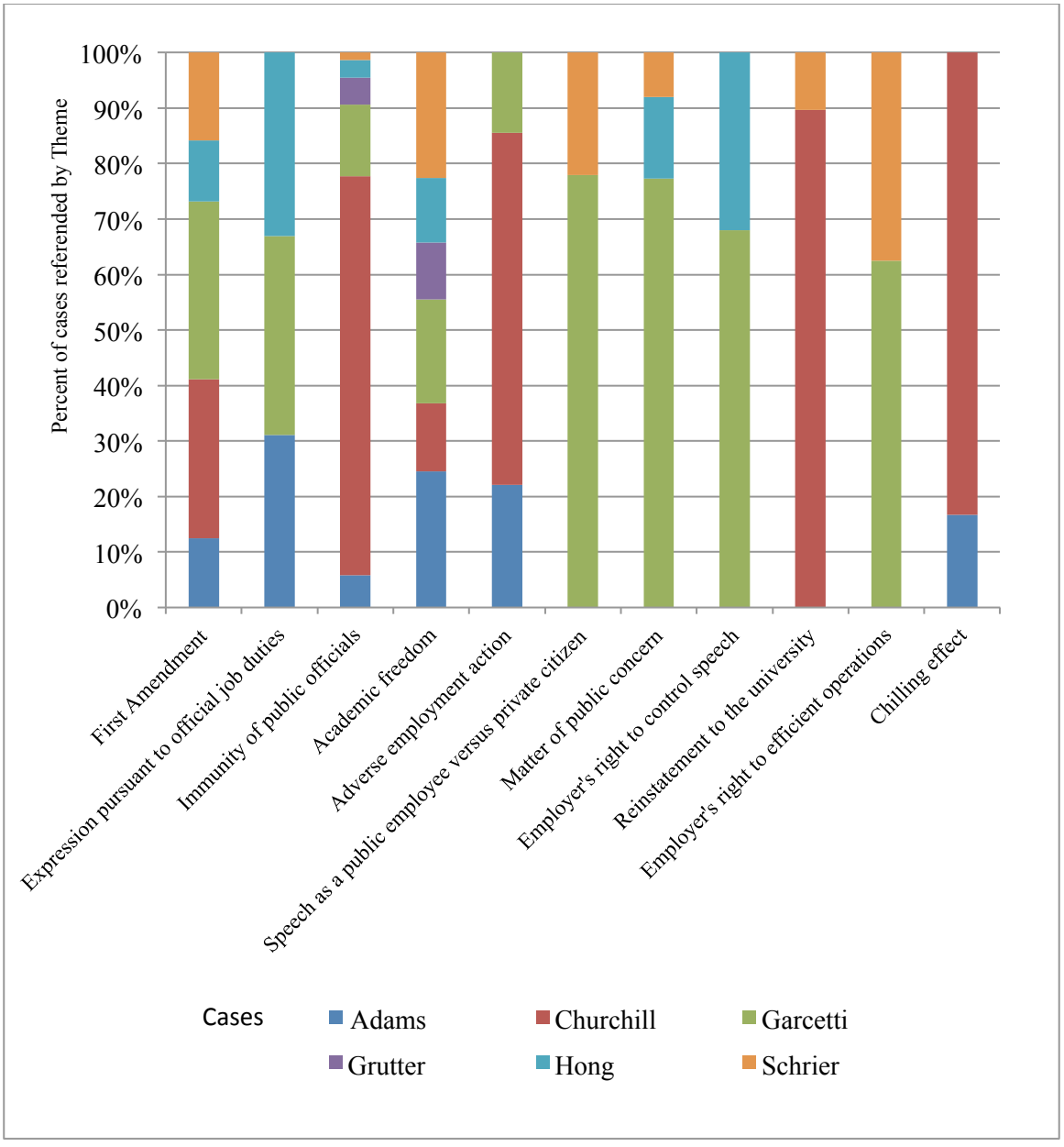


Figure 10.2. Cases Referenced in Prevalent Themes

To understand the courts' and amicis' focus, a bar chart is provided in Figure 10.3. The chart illustrates the number of coded references of each opinion and brief in each of the 11 prevalent themes. Viewing the data in this manner provides a clear picture of the themes that each court discussed as the cases progressed through the courts from 2000 to 2012.

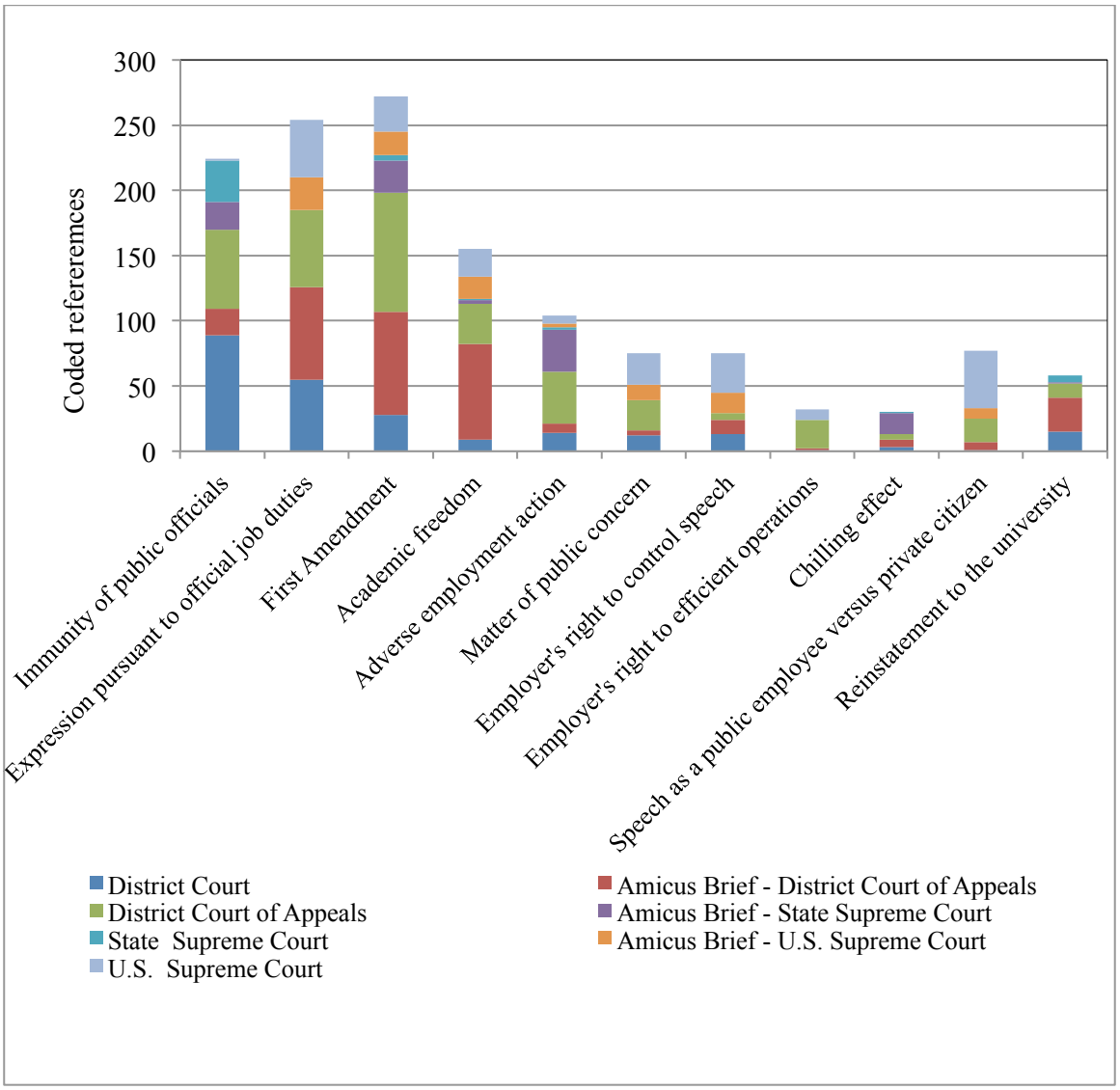


Figure 10.3 Coded References by Theme Across the Court Opinions and Amicus Briefs

Grutter v. Bollinger. Two of the 11 themes, academic freedom and immunity of public officials, were identified in *Grutter*. As illustrated in Figure 10.1, these themes were evident throughout the study. The importance of the case to the discussion is the Supreme Court's post-2000 recognition of the university's right to academic freedom. In upholding the university's right to decide the make-up of the law school student body, the Supreme Court's decision reaffirmed their support for institutional academic freedom and extended the university's right to make broad academic decisions in order to further their interests. As such, the court provided a level of deference to the university, stating,

> the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. (*Grutter*, 2003, p. 22)

The significance of this decision provides subsequent cases with the ability to control academic decision including faculty speech.

The university's use of immunity for public officials was evident in the district court as a first line of defense against lawsuits. The district court granted summary judgment to the defendant's based on their right to individual qualified immunity under the Eleventh Amendment to prevent regents, presidents, and other defendants from being sued. The institution was denied immunity but the right to immunity at various levels was used in all the cases studied.

Garcetti v.Ceballos. The references coded in *Garcetti* included all the prevalent themes except the chilling effect theme. The speech as a private citizen versus public

employee, matter of public concern, employer's right to control speech, and employer's right to efficient operations themes provided the majority of references coded. The First Amendment and expression pursuant to official job duties themes were infused within these major themes but were not the focus of the courts' discussions. As court cases are events, these discussions provide legal insight to answer the research question, "[h]ow have these events changed the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee?"

Throughout the case, the *Garcetti* courts focused on whether public employee speech was protected under the First Amendment when it addressed a matter of public concern and whether public employers were bound by the First Amendment to allow their employees to exercise their free speech rights if it affects the efficiency of their operations. Even though, the circuit court ruled that the defendant's speech was a matter of public concern, the Supreme Court recognized that speech made as part of the employee's job responsibility was not protected or owned by the employee holding,

> [W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. (Garcetti, 2006, p. 11)

The court holding did not restrict his rights as a private citizen to speak on matters of public concern but rather "reflects the exercise of employer control over what the employer itself has commissioned or created" (p. 11) in order to maintain the efficiency of their operations. The discretion to determine whether an employee speech is part of his or her job or disrupts the public employer's ability to operate was left to the employer to control.

While the case involved a public office, the court's decision has implications on faculty intramural and extramural speech. In addition to teaching and research, faculty participate in university governance structures as members of committees, deans and department heads. These roles are part of their job duties and, based on *Garcetti*, places faculty in a vulnerable situation when serving in these capacities. Justice Souter warned of this quandary,

> This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to…official duties." (p. 18)

In his majority opinion, Justice Kennedy side-stepped the issue with what became known as the *Garcetti* reservation stating,

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. (p. 12)

As such, the court left the decision of determining whether employee speech is public or private and within the university's right to control for the district courts to decide at a later date.

Schrier v. the University of Colorado. The *Schrier* case dealt directly with a department chair removed for his intramural speech about the relocation of the university's health science center to a new location. The case was decided six months after *Garcetti* and focused on the themes of academic freedom, speech as a private citizen versus public employee, employer's right to efficient operations, and matter of

public concern. These themes are discussed in relation to Schrier's role as a department chair rather than his role as a faculty member and the university's right to control his speech.

To determine if Schrier's speech was protected, the appellate court used the *Pickering* balance test. While the court held that Schrier's speech was a matter of public concern, they found that his speech was "having a negative impact both on his performance [as a chair person] and on the University's operations" (*Schrier*, 2005, p. 22) thus failing the second prong of the test. The court used the same logic to deny Schrier's reinstatement concluding that it "would place the court in a position where it may have to provide supervision, and…would be disruptive and detrimental to the essential functioning of University business" (p. 8). The decision questions whether academic speech is protected when faculty serve as part-time adminsitrators and do not support the university's decisions.

In addition, the appellate court refused to recognize academic freedom as a special concern of the First Amendment. In denying Schrier's claim that the university violated his academic freedom, the court stated,

> the right to academic freedom is not "a subset of the First Amendment, separate and distinct from the fundamental right of free speech." In fact, the court expressly refused to endorse any suggestion that speech in an academic setting concerning the operations of a university enjoys greater constitutional protection than does political speech in the public forum. (pp. 22-23)

The statement implies that academic speech concerning the operations of a university is not protected and that faculty can be held accountable as public employees for their non-classroom speech. The court added that it disagreed with "Schrier's argument…that

professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees" (p. 24). By equating speech by faculty serving in governance roles with that of public employees, the court's decision enhanced the university's right to control speech that disrupts or questions their academic decisions and their operations.

Hong v. the University of California at Irvine. After *Garcetti* and *Schrier*, the expression pursuant to job duties theme became prevalent. The Supreme Court had already decided that employee speech was not protected when their speech was determined to be part of his or her official duties. The *Hong* case is the first in the study that uses *Garcetti* to control faculty intramural speech. Referencing *Garcetti*, the court reiterated the employer's right to regulate employee speech,

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Allowing anything less than unfettered employer control over speech within an employee's official duties would "displace managerial discretion for judicial supervision," requiring "permanent judicial intervention in the conduct of governmental operations." (Hong, 2007, p. 7)

Adding,

> an employee's official duties are not narrowly defined, but instead encompass the full range of the employee's professional responsibilities. While an employee's job description is not dispositive of his official duties, any activity within an "employee's uncontested employment responsibilities" is an official duty. (p. 7)

As such, the court found that Hong's official duties went beyond teaching and research to "include a wide range of academic, administrative, and personnel functions in accordance with [University of California at Irvine's] self- governance principle" (p. 8).

His statements and criticisms concerning a faculty member's mid-year review, a professor's consideration for a merit increase, his department's use of lecturers, and his department's hiring process "were made pursuant to his official duties and, therefore, do not deserve First Amendment protection" (p. 9). The court also found that Hong's statements were not a matter of public concern and should be "characterized as internal administrative disputes which have little or no relevance to the community as a whole" (p. 9). While the university required shared governance, they, and the courts were not tolerant or supportive of faculty providing input or criticizing their decisions. Amici contented,

> the speech of university professors merits a special degree of protection not only to facilitate an uninhibited pursuit of truth and advancement of knowledge, but equally to encourage scholars to speak candidly and fearlessly as they convey sometimes unwelcome or unsettling truths to government and citizens. (*Hong*, 2008, p. 16)

The court held that "UCI [was] entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities" (p. 9). As such, institutional academic freedom trumped faculty academic freedom. When faculty participate in shared governance and voice their opinions openly, their role as faculty members morph into being public employees and their speech can be considered a part of their official job duties, not protected, and open to disciplinary action.

Churchill v. the University of Colorado at Boulder. Churchill is significant in that the district trial jury determined that the university's investigation of Churchill's publications would not have occurred if he had not published his September 2011 essay,

On the Justice of Roosting Chickens, concerning 9/11 and U.S. foreign policy. The jury found in favor of Churchill's claim for relief based on First Amendment retaliation (*Churchill*, 2009) and "concluded that 'the Board of Regents of the University of Colorado use[d] [Churchill's] protected speech activity as a substantial or motivating factor in the decision to discharge [him] from employment,' and that the termination harmed Churchill" (*Churchill*, 2010, p. 9). They awarded him nominal damages in the amount of $1. The jury's decision affirmed that Churchill's intramural speech was investigated due to his controversial extramural speech. The university immediately moved for a judgment on the grounds that they and the regents were barred from lawsuit by the doctrine of quasi-judicial immunity. The appellate court added, "the jury found that the University and the Regents had not shown by a preponderance of the evidence that Churchill would have been dismissed for reasons other than his exercise of free speech" (p. 10). The discussion of Churchill's claims as opposed to the university's right to immunity consumed the remainder of court opinions.

The immunity of public officials theme was prominent in the *Churchill* case and used by all the circuit courts to deny Churchill's claims. While the university waived its right to Eleventh Amendment immunity, it argued that the regents were quasi-judicially immune based on their constitutional right to supervise and govern the operations of their institutions and that the disciplinary process which was based on predefined policies and procedures was followed throughout their investigation of Churchill. The district court clarified the definition of quasi-judicial immunity stating, "[w]hen a governmental body applies preexisting legal standards or policy considerations to

present or past facts presented to the governmental body, then one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity" (*Churchill*, 2009, p. 14). The court determined that the regents and administration had acted in a judicial manner and satisfied all the necessary quasi-judicial requirements, which included:

> (1) the right to notice of charges; (2) the right to request a hearing before a faculty committee; (3) the right to challenge the participation of a member of the faculty committee; (4) the requirement that the University prove that grounds for dismissal exist by clear and convincing evidence; (5) the requirement that the University transcribe the hearing; (6) the right to representation by counsel; (7) the right to examine each University witness; (8) the right to present witnesses; (9) the right to present oral and written closing arguments; (10) the right to respond to the faculty committee's findings; (11) the right to request a hearing before the Board of Regents; (12) the requirement that the Board of Regents consider only the evidence in the record; (13) the requirement that the Board of Regents take final action in a public meeting; and (14) the right of judicial review of the Board of Regents' decision. (p. 18)

The appellate court agreed with the district court's findings that the regents and the university were immune, stating,

> the nature of the decision reached by the University and its Regents, and the process by which that decision was reached, shared enough characteristics with the judicial process to warrant absolute immunity from liability [and that they] perceive no error in the trial court's analysis which looked to the nature and process of the University and the Regents' activities in concluding that there was enough functional similarity between their actions and the judicial process to justify the application of quasi-judicial immunity. (*Churchill*, 2010, pp. 21-22)

The Colorado Supreme Court agreed and concluded, "that the Regents are entitled to absolute immunity because their role as quasi-judicial public officials was functionally comparable to the role of a judge" (*Churchill*, 2012, p. 23). The court's decision dismissed all of Churchill's claims of harassment, political bias on the part of the regents, reinstatement as equitable relief, and adverse employment actions resulting in

his termination. The immunity defense was cited in each of the cases studied with the most coded references (162) in *Churchill*. As long as public universities have established policies, procedures, and processes when disciplining faculty and the regents and administration follow them, their quasi-judicial actions are legally protected under the doctrine of absolute immunity. The decision by the 10th Circuit Court system moved the balance of power in the university's favor, allowing them to exert control over the actions of its faculty and retaliate against faculty for their extramural and intramural speech or, as this case shows, both.

Adams v. the University of North Carolina at Wilmington. As with *Hong*, the expression pursuant to official job duties was the most prevalent theme. The case provided the 4th Circuit Court's interpretation of *Garcetti*, questioned the role of the faculty member as a public employee, and discussed the Supreme Courts reservation of applying the *Garcetti* decision to academic speech.

The case revolved around the materials provided by Adams in his tenure and promotion package and whether his promotion was denied due to his religious viewpoints and conservative opinions. The university's response to his allegations was that the materials provided in Adams' tenure and promotion package were a part of his official duties as a faculty member. The district court agreed, concluding that Adams' speech was not protected by the First Amendment because Adams' "inclusion of the speech in his application for promotion trumped all earlier actions and marked his speech, at least for promotion purposes, as made pursuant to his official duties" (*Adams*,

2011, p. 19) as held in *Garcetti*. The appellate court disagreed and addressed the application of *Garcetti* to the case stating,

> The district court's decision rests on several fundamental errors including its holding that protected speech was converted into unprotected speech based on its use after the fact. In addition, the district court applied *Garcetti* without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university. (p. 19)
>
> Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment" (p. 19).

The court added, that "the district court's subsequent analysis ignores the role Adams occupied when he spoke [and,] although undoubtedly protected speech when given, was somehow transformed into unprotected speech" (p. 20). The court contended that,

> Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields. For all the reasons discussed above, that thin thread is insufficient to render Adams' speech "pursuant to [his] official duties" as intended by *Garcetti*. (p. 25)

The appellate court concluded that it was "not compelled by *Garcetti* to extend its principles to the case" and the district court had erred in their analysis. As such, they reversed "the district court's grant of summary judgment as to Adams' First Amendment claims" (p. 29) and remanded the case for further consideration.

In recognizing the *Garcetti* reservation, the 4th Circuit Court held that faculty are not just public employees whose extramural and intramural speech are part of their official job duties. While the lower court considered the content and context of Adams' speech, they ignored the role that Adams occupied when he spoke. He was a faculty

member. The decision is important to the discussion of the faculty's official duties as researchers who publish, teachers who deliberate a wide range of topics, some of which are controversial, and active participants in public university shared governance who are allowed to discuss their opinions without the fear of reprisal. The court's remand was the only case in the study that was decided partially in favor of the faculty member and was a positive outcome for protecting faculty intramural and extramural speech. The university mediated the case and settled out of court.

Case Findings

To report the case analysis findings, the study answers each of the four research questions. In answering the questions, the terms "events" and "case" are synonymous. The study considers the six cases to be events that are interrelated over the time period of the study. The questions and findings are discussed.

Effect of federal, state, and local events on academic freedom. The six cases exemplified how decisions made in the federal, state, and local courts affect academic speech. The first case studied chronologically, *Grutter*, provided a baseline for the university's right to control academic decisions and environment. While *Grutter* focused on law school admissions standards, the Supreme Court's ruling in favor of the university recognized the institutional academic freedom of the university. In subsequent cases such as *Garcetii, Schrier*, and *Hong*, institutional academic freedom was reinforced by the court's decisions to uphold public employer's right to control employee speech. The decision was buttressed by the reluctance of the court to interfere with academic decisions and their determination that faculty are public employees. The

two themes, right to control speech and right to efficient operations, exemplified the court's support for institutional academic freedom and the institution's ability to silence public employee speech when it interferes with business decision. For universities, these actions have strengthened their control over the academic environment and weakened the ability of the faculty to speak freely on issues outside of the classroom.

While *Gutter* was the precedent, *Garcetti* provided the definitions for what type of speech public employers have the right to control. In May 2006, the *Garcetti* Court modified the *Pickering* test by adding an initial step to determine whether an employee was speaking pursuant to his or her official job duties and whether the employee's speech was protected or not. In the *Hong* and *Adams* cases, the faculty members served on college leadership or shared governance committees and, based on the *Garcetti/Pickering* analysis, their speech was categorized as coming from a public employee and, therefore, not protected by the First Amendment. This definition presents a quandary for faculty speech especially when they are required to participate in the decision-making and operations of his or her university. While the *Garcetti* court left the district courts to work out the details of its decision, the effect that it will have on academic freedom remains different in each of the circuits studied and dependent on whether universities are supportive of unfettered faculty speech regardless of their role.

The September 11, 2001 attacks on the World Trade Center prompted the decision by the University of Colorado to initiate an investigation of Ward Churchill's articles and research for academic misconduct. Published soon after the attacks, *On the Justice of Roosting Chickens,* concerning the attacks and U.S. foreign policy, resulted in

legislators and university regents calling for his termination. While the university found that the essay and his speech was protected by the First Amendment, they opened an investigation into Churchill's other articles that he had published during his tenure at the University of Colorado. The investigation found evidence of research misconduct and he was terminated from his tenured position at the university. The case provided an example of how controversial extramural speech on a national event can trigger actions originating outside the university resulting in the termination of a tenured faculty member. While Churchill contended that the actions of the court would chill speech, no conclusive evidence was provided to validate that assertion.

Effect these events have on the way universities and faculty handle intramural speech. The *Grutter* and *Garcetti* decisions reaffirmed the institution's right to govern internal academic decision-making and to control academic speech based on the role of the speaker. Two cases, *Hong* and *Adams*, provided insight into how courts applied the *Garcetti* standard to determine whether their intramural speech was made pursuant to the public employee's official duties. In *Hong*, the district court found that his intramural speech as a department chair was a matter of public concern but ruled that it was not protected because it was part of his official job duties. The district and appellate courts ruled in favor of the university. In *Adams*, the district court found that his speech, which was provided in his tenure and promotion package, was made as part of his official job duties as a faculty member and not protected. On appeal, the court reversed the decision of the lower court, finding that they had ignored the Supreme Court's reservation of applying *Garcetti* to academic speech and had, therefore,

misapplied the *Garcetti* analysis. In 2011, the court remanded the case for further analysis but it was settled out of court. These conflicting outcomes in two different circuits epitomize the issues facing faculty as public employees when the content of intramural speech becomes an issue with their university.

The question of whether *Garcetti* applies to academic speech depends on the role faculty hold when they speak. Intramural classroom speech was not challenged in the cases researched. Non-classroom intramural speech, which the university decided was interfering with university operations, was an issue in the *Schrier* and *Hong* cases and the university reacted by exerting its right to control the speech. In these cases, both faculty members were removed from their leadership roles due to their adversarial speech against decisions made by their respective colleges. While they retained their tenured faculty positions, the university successfully defended their actions and right to control intramural speech in court.

Effect these events have on the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee. The Supreme Court's decision in *Garcetti*, in 2006, was pivotal in determining whether the speech of public employees was protected by the First Amendment when their speech was part of their job duties. As illustrated in Figure 10.2, the court's discussion from 2004 to 2008 was dominated by three interrelated themes: speech as a public employee versus private citizen; expression pursuant to official job duties; and employer's right to control speech. Once the *Garcetti* court (2006) decided that public employers had the right to control speech that was part of the employee's job

duties, the speech as a public employee versus private citizen theme had no references. Instead, the district courts focused on determining whether the context and content of the employee's speech was made as part of his or her job duties and whether the institution had a right to control his or her speech. While the Supreme Court left the district courts with the task of deciding how the decision applies to universities, the focus of the court's opinions clearly turned to discussions of whether faculty's intramural and extramural speech can be consider part of their job duties and within the university's right to control.

Effect these events have on faculty's ability to defend their academic freedom. In all the cases researched, the immunity of public officials theme was referenced. Universities successfully defended immunity for their regents and senior administrators named in their lawsuits. Universities initiated their motions for immunity in the lower courts, which were upheld in all the higher courts. Immunity proved to be a valuable tool in reducing university's exposure to lawsuits and the cost required to defend the university.

A university's ability to claim immunity can have adverse effects on academic freedom if faculty members are not allowed to defend their speech in court. Shortly after the September 11th attacks on the World Trade Center in New York, Ward Churchill published an essay critical of U.S. foreign policy. The content of the essay was controversial. Legislators and university regents called for his termination. While the university found that the essay and his speech was protected by the First Amendment, they opened an investigation into Churchill's other articles that he had published during

his tenure at the University of Colorado. The investigation found evidence of plagiarism and he was terminated from the university. During the trial, the jury ruled that the university would not have investigated his publications had he not published the essay and awarded him a nominal amount of $1. In turn, the Colorado district, appellate, and Supreme Courts ruled that the university and its regents were immune from lawsuits and dismissed all of Churchill's claims. The *Churchill* case exemplified how public institutions and universities can use immunity to dismiss claims against them and maintain control of academic speech without having to defend themselves against violations of protected speech.

Summary

The six cases analyzed provided the basis for the court ruling when free speech by public employees and faculty interfered with the university's political environment, operations, or right to make academic decisions. The courts ruled that public employee speech, when it is part of his or her job duties, was not protected by the First Amendment and that the employer has the right to discipline the employee for his or her speech. As a public employee, faculty who are promoted within their colleges or participate in shared governance must be aware at all times that the context and content of their speech can be held against them. In the six cases studied, the courts ruled in favor of the public employer or university and their right to control the employee's speech. None of the briefs filed by the AAUP and ACLU were successful in changing or reversing these decisions. Further reducing the faculty's ability to succeed in court is the public university's right to claim immunity for their regents and administrators, leaving

the university as the focus of the lawsuit. All their motions for immunity were successful. The court's ruling have placed the control of academic speech in the university's hands and reduced the ability of faculty to defend themselves.

The combined case analysis is used to provide a baseline for the second phase of the research, the interviews. The 35 themes identified in the six cases have been reduced to 11 themes. To provide continuity in the analysis, these 11 themes are recreated and used as the initial themes in the interview analysis in order to determine how these cases have affected academic freedom since 2000.

Chapter Eleven: Interviews

The second phase of the study was one-on-one interviews of tenured or tenure-track faculty from public universities throughout the U.S. The chapter provides a description of the sampling methodology, an overview of the sample demographics, and an analysis of the six prevalent themes coded from the interviews. To focus the analysis, four major sub-themes overlapping each prevalent theme are discussed.

Sampling Methodology

After Institutional Research Board (IRB) approval, the participant selection process entailed two sample selection methodologies; a stratified sampling method followed by a snowball sampling process. The initial stratified sample included 23 public university faculty members who are currently active in their institution's governance structure or were past faculty senate officers. The sample was selected based on a review of public university governance websites. Selected faculty members were emailed a description of the study and the consent form and asked if they would consent to be interviewed (see Appendices B, C, and D for the email invitation, description of the study, and consent form respectively). Faculty members who did not respond were sent one follow-up email. If no response was received, they were dropped from the sample. The stratified sample identified eight faculty members who agreed to be interviewed with eight declining, and seven not returning the first or second invitation.

Next, to achieve the goal of interviewing 16 to 21 faculty members, a snowball sampling methodology was used. The participants in the stratified sample who declined to be interviewed were contacted immediately and asked to provide recommendations of

faculty at public universities who might be willing to participate in the study. In addition, faculty members who agreed to be interviewed were asked to provide recommendations during the follow-up survey. This methodology yielded 26 additional potential participants: 11 agreed to be interviewed; 11 did not return the request; and four declined. Faculty who did not return the request were not contacted again and dropped from the sample. Nineteen faculty members were interviewed. The process required six months to complete.

Participant Interview and Survey

The faculty interviews were conducted on the phone or one-on-one, digitally audio recorded, and scheduled for 60 minutes in length. All recorded interviews were sent via secure file transfer protocol (SFTP) to a bonded transcription service, transcribed in full, and returned via encrypted email. The transcriptions were reviewed and emailed to participants who were asked to respond within 30 days with clarifications and corrections. This "phenomenological validity" test was used to correct errors and identify research bias between the researcher and the interviewees (Miles & Huberman, 1994). Five participants responded within the allotted time with corrections. A non-response by the participant was viewed as consent to continue with the transcription as it was presented.

A tracking document was used to record the name of the participants, date interviewed, consent to waive confidentiality, length of interview, date transcribed, date transcription was sent to participant for review, and date the participant responded with transcription corrections. Of the 19 participants, 18 consented to be recorded. The

participant who declined to be recorded agreed to answer the questions, which were recorded manually and transcribed by the researcher.

The interviews averaged 52.2 minutes in length, with the shortest being 20 minutes and longest 79 minutes. During the interview, participants were asked for their consent to be interviewed and whether they waived their confidentiality. Fourteen participants waived their confidentiality and were willing to be quoted by name within the study (see Appendix F for the list of participants who waived confidentiality). Four participants did not waive their confidentiality, requiring that they not be identified of identifiable.

To focus the conversation on academic freedom since 2000, each participant was read background information and asked five questions in the following order.

1. How have federal, state, and local events affected academic freedom at your institution since 2000?
2. Is academic freedom a right or a privilege at your institution? What criteria does your institution use to evaluate faculty academic freedom when their speech as a public employee and private citizen converge and become an issue?
3. In what ways do the faculty governance structures at your institution respond when challenges to faculty intramural and extramural speech occur?
4. What effect does institutional academic freedom have on the faculty's role in the governance structure at your university?

5. How have faculty at your institution altered their intramural and extramural speech since 2000?

The broadness and open-endedness of the questions allowed for the introduction of follow-up questions with the intent of identifying prevalent themes and arguments in order to improve the analysis. All questions, participant reactions, and any interruptions or environmental changes were recorded in order to identify uncontrolled interferences and interviewer bias (Miles & Huberman, 1994). Three interruptions were recorded. Two were due to cell phone signal failure and one from background noise. Inaudible recording issues were noted by the transcriber in each transcription with a recording time stamp. Corrections were made during the participant transcript correction process or by listening to the recordings at slower speeds.

After the interview, an anonymous post-interview survey was emailed to each participant (see Appendix E for participant survey and questionnaire). Participants had seven days from the date of the interview to respond. The survey collected general data such as region of country broken down by Supreme Court district, appointment track and type, generational age group, gender, ethnicity, whether they had participated in faculty governance at their institution since 2000, whether they had published on academic freedom, and a space for additional comments. All participants answered the survey and returned it within the allotted time.

Demographics

The researcher contacted participants from each of the 11 Supreme Court districts. No faculty members from districts 2, 8, 10, and 11 were interviewed because

they either declined or did not respond to the requests for interview. District 5 had the largest number of participants with seven interviews followed by districts 7, 6, 4, 1, 3, and 9. Table 11.1 provides a breakdown by district.

Table 11.1

Interviews by Supreme Court District

Supreme Court District	States Abbreviations	Total
1	ME, NH, MA RI	1
2	CT, NY	0
3	DE, PA, NJ	1
4	MD, DC, WV, VA, NC, SC	2
5	MS, LA, TX	7
6	MI, OH, KY, TN	3
7	WI, IL, IN	4
8	ND, SD, NE, MN, IA, MO, AR	0
9	WA, OR, CA, NV, AZ, ID, MT, HI, AK	1
10	WY, UT, CO, NM, KS, OK	0
11	AL, GA, FL	0

The majority of the participants were White (17), male (16) and baby boomers (11). Fourteen of the Caucasians were male and three were female with three from the Silent Generation, 10 from the Baby Boom generation, and four from the Generation X. The remaining two participants were male, one African American from the Generation X generation and one Asian/Pacific Islander from the Baby Boom generation. The sampling methodology included a number of faculty members from the underrepresented ethnicities and genders, but they either declined or did not respond to the study invitation. Table 11.2 provides a breakdown of ethnicity and gender.

Table 11.2

Ethnicity, Gender, and Generation of Participants

Ethnicity	Male	Female	Silent Generation (1925-1946)	Baby Boom Generation (1947-1960)	Generation X (1961-1982)	Generation Y Millennial (1983-2000)
Caucasian	14	3	3	10	4	0
Hispanic	0	0	0	0	0	0
African American	1	0	0	0	1	0
Asian and Pacific Islander	1	0	0	1	0	0
Native American and Alaskan Native	0	0	0	0	0	0
Total	16	3	3	11	5	0

The research survey also requested information concerning each participant's appointment type and track. The majority of the participants (18) were tenured with one assistant professor, four associate professors, and 13 full professors. One participant was a tenure track associate professor. None of the participants were non-tenured faculty. Also, no faculty in the appointment type which included lecturer, clinical, and itinerant were interviewed. Table 11.3 provides the breakdown of the appointment type and track.

Table 11.3

Appointment Type and Track of Participants

Appointment	Assistant professor	Associate professor	Full professor	Other	Total
Tenured	1	4	13	0	18
Tenure Track	1	0	0	0	1
Non-tenure track	0	0	0	0	0
Total	2	4	13	0	19

The survey asked participants if they had participated in their college or university's governance system and if so, the role that they served. Eighteen replied that

they had participated, four as Faculty Senate chairs and six as members. All of the 18 stated that they had served as a member or chaired governance committees at their institutions or nationally. These committees included their college or university's Academic Freedom and Responsibilities, Promotion and Tenure, Professional Standards, University Academic Freedom Committee, Personnel Policies, Positive Action, Termination of Employment, and curriculum committees. One participant was the current president of the AAUP. Their knowledge of academic freedom was exemplified by the final survey question, which asked if they had published on the subject of academic freedom. Eleven indicated they had published on the topic and 7 had not.

In summary, the majority of the participants in the study were White males (14 or 73.6%) from the baby boom generation (11 or 57.9%). They were tenured, full professors (13 or 68.4%) so they had a property right to their position and their contract provides them with academic freedom and speech protections. They were active participants in the governance structure and committees of their institution (17 or 89.5%) and had published on the topic of academic freedom (11 or 57.9%), indicating their knowledge of institutional policies, governance and faculty rights. Also, of the 19 participants, 10 were professors in the colleges of liberal arts and humanities, three in schools of law, three in colleges of education, two in colleges of communications, and one in the college of business.

Analysis

The 19 participant interviews and surveys were conducted over a six month period between January 2012 and June 2012. The 11 most prevalent themes from the

case analysis were used as the basis to initiate the interview coding. The themes included First Amendment, expression pursuant to official job duties, immunity of public officials, academic freedom, adverse employment action, matter of public concern, speech as a public versus private citizen, employer's right to control speech, reinstatement to the university, employer's right to efficient operations, and chilling effect. The interview coding process resulted in two of these themes (employer's right to control speech, employer's right to efficient operations) being combined and titled university's control of academic speech and one (reinstatement to university) being dropped. Seven additional themes were added during the coding process for a total of 16 interview themes.

The 16 themes resulted in 980 coded references. The themes and the corresponding number of coded references are provided in Table 11.4. The themes are sorted by the total column from largest to smallest to illustrate a hierarchy of the most significant themes.

Table 11.4

Coded References by Theme

Themes	Totals by Theme
University control of academic speech	162
Academic freedom - privilege or right	116
Outside influence and restrictions on academic speech	108
Faculty governance	104
Chilling effect	99
Academic freedom -intramural and extramural speech	75
Lawfare	68
First Amendment	52
Speech as a public employee versus private citizen	42
Expression pursuant to official duties	41
Institutional academic freedom	38
Adverse employment action	29
Faculty activism on campus	23
Faculty union - bargaining agreements	12
Matter of public concern	7
Immunity of public officials	2
Total coded references	980

To validate the theme ranking, the researcher developed two queries to determine the most frequently used words in all the interviews. Each word was analyzed to determine how it was used in order to categorize it with one of the above themes. The first query scanned word frequency across all the interviews to identify the 50 most prevalent, four or more letter keywords. Each keyword's contextual usage in the interviews was analyzed to determine whether the individual keyword was significant or required one or more adjacent words to improve meaning and reduce redundancy. Themes with no applicable keywords utilized the theme title or words within the coded references and added to the list of keywords or phrases. These keywords and two or more word phrases were aligned with each theme and used in a second text search query

across all the interviews to determine the number of references in each interview for later comparison with the theme coding hierarchy in Table 11.4.

Of the original 50 keywords queried, 42 remained relevant to the analysis and eight were dropped due to irrelevance, vagueness, or lack of specificity. Fifteen of the remaining keywords were used individually or combined with NVivo search wildcards (~, *) to reduce redundancy. In addition, 51 words were defined based on a review of the coded references in the themes and applied to themes that had no keywords found in the query. Fifty-two phrases consisting of keywords and adjacent words in the opinions or theme titles were also identified. Each keyword and phrase was aligned with one of the 16 themes and used in the second word search query to count the number of times the words or phrases were referenced in each interview. Each occurrence in each interview was reviewed to eliminate redundancy and duplicity of reference counts. Where redundancy was found, the query was refined and rerun. The query results were tabulated and sorted in descending order by the total number of references for each theme. The results are provided in Table 11.5.

Table 11.5

Keywords and Phrases Totaled and Sorted by Theme

Themes	Key words	Totals by Theme
Faculty governance	Shared, faculty governance, faculty senate, committee, governance structure, co-governance, governance model, campus governance	399
Outside influence and restrictions on academic speech	ACLU, AAUP, right-wing, legislator, court, political*, legal system, conservative, legislature, Horowitz, donors, newspaper, corporat*, republican coalition, 911, 9/11	320
University control of academic speech	Power, control, university administration, main administration, crack down, provost, process, administrative structure, polic*, investigation	313
Academic freedom - intramural and extramural speech	Intramural, extramural, in-class speech, on campus, off campus, controversial	238
Academic freedom - privilege or right	Privileg*, individual right, it's a right, not a right, right and responsibility, institutional right, not a private right, is a right	192
Chilling effect	Chill*, silence, repress*, head down, heads down, subtle, fear, reluctan*, guarded, harassed, radar, exclusion , oppress*, cauti*, alter*, censor*	172
First Amendment	First Amendment, constitutional right, freedom of speech, freedom of expression, free speech, free expression	160
Lawfare	Lawfare, Patriot Act, speech codes, supreme court, district court, court case, *Garcetti*	150
Faculty activism on campus	Against, activ*, solidarity, concerns, fight, challenge, speaking out, speaking up, protest	147
Adverse employment action	Terminat*, exigency, fire, retaliat*, adverse, discipline, deny, denied tenure	127
Faculty union - bargaining agreements	Union, contracts, right to work	89
Institutional academic freedom	Institutional academic freedom, right of the institution, institution's academic freedom, institutional right	75
Speech as a public employee versus private citizen	Speech as an employee, speech as a citizen, citizen, role	69
Expression pursuant to official duties	Public employee, official duties, job duties, employment	59
Matter of public concern	Public good, public interest, trusted	7
Immunity of public officials	Summary judgment	2

The theme rankings in Table 11.4 and 11.5 were compared to validate the hierarchy of the themes and identify anomalies. As indicated in the tables, the six most

prevalent themes were 1) university control of academic speech, 2) academic freedom – privilege or right, 3) outside influence and restriction on academic speech, 4) faculty governance, 5) chilling effect, and 6) academic freedom - intramural and extramural speech. To determine the strength of the linear relationship between each of these themes, a Pearson correlation coefficient (r) of word similarity was calculated. As shown in Table 11.6, all six prevalent themes had strong positive relationships, above r = 0.90, with the highest five correlations between the university control of academic speech and chilling effect themes (.97656), the university control of academic speech and outside influence and restriction on academic speech (0.97125), the chilling effect and academic freedom – intramural and extramural speech themes (0.96495), the university control of academic speech and faculty governance themes (0.96315), and the outside influence and restriction on academic speech and chilling effect themes (0.95967).

Table 11.6

Pearson Correlation Coefficients for the Six Prevalent Themes

Theme A	Theme B	Pearson correlation coefficient
University control over the academic speech	Chilling effect	0.97656
University control over the academic speech	Outside influence and restrictions on academic freedom	0.97125
Chilling effect	Academic freedom - intramural and extramural speech	0.96495
University control over the academic speech	Faculty governance structure	0.96315
Outside influence and restrictions on academic freedom	Chilling effect	0.95976
University control over the academic speech	Academic freedom - privilege or right	0.95838
University control over the academic speech	Academic freedom - intramural and extramural speech	0.95435
Outside influence and restrictions on academic freedom	Faculty governance structure	0.94200
Outside influence and restrictions on academic freedom	Academic freedom - privilege or right	0.93848
Chilling effect	Academic freedom - privilege or right	0.93673
Faculty governance structure	Chilling effect	0.92792
Outside influence and restrictions on academic freedom	Academic freedom - intramural and extramural speech	0.92567
Academic freedom - privilege or right	Academic freedom - intramural and extramural speech	0.92320
Faculty governance structure	Academic freedom - intramural and extramural speech	0.90655
Faculty governance structure	Academic freedom - privilege or right	0.90581

The six prevalent themes are analyzed and discussed based on the order provided in Table 11.7. A bar chart of Table 11.7's coded references is provided in Figure 11.1.

Table 11.7

Number of Coded References in Six Most Prevalent Themes

Themes	Total coded references by theme
University control over the academic speech	162
Academic freedom - privilege or right	116
Outside influence and restrictions on academic speech	108
Faculty governance	104
Chilling effect	99
Academic freedom -intramural and extramural speech	75

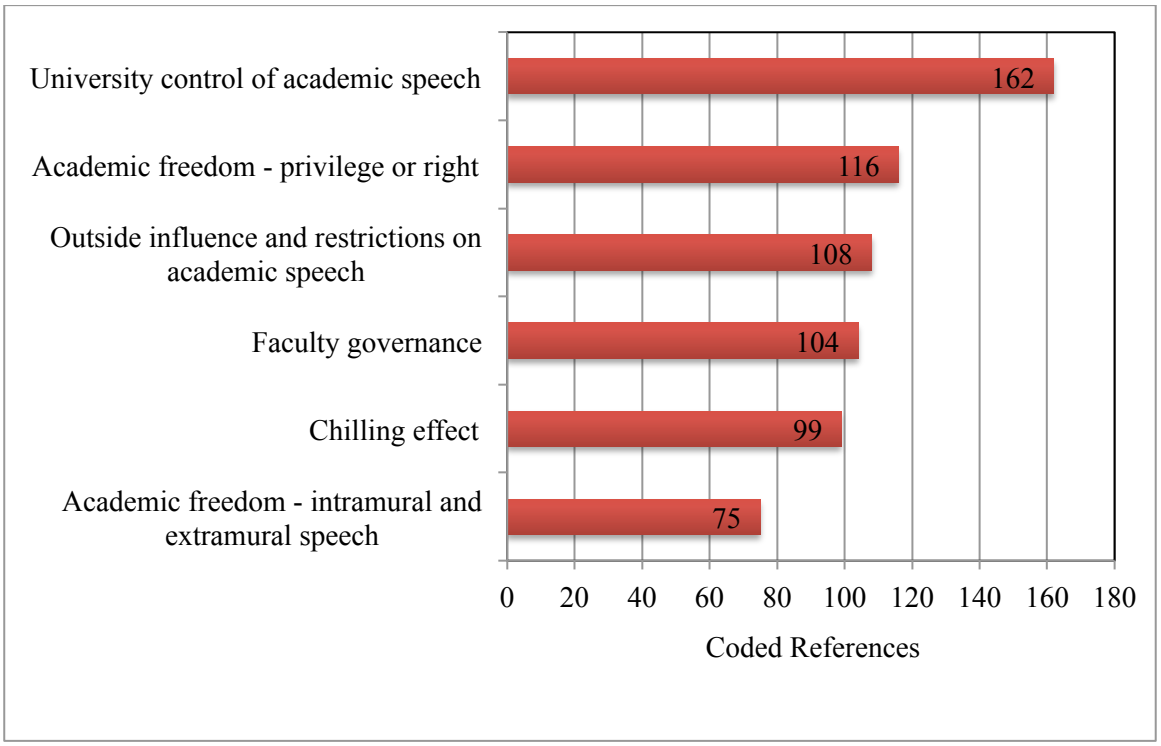


Figure 11.1. Six Most Prevalent Themes Based on Coded References

University control of academic speech. The most prevalent theme is university control of academic speech, which focuses on the authority of the public university to regulate and their actions used to control faculty intramural and extramural speech. As Table 11.5 indicates, keywords and phrases identified in the interviews included power,

control, university administration, main administration, crackdown, provost, process, administrative structure, police, policy, and investigation. These keyword and phrases were found in the theme's coded references. Below are quotations from the interviews in which the participant indicated whether their university controlled academic speech.

- Control over the academic freedom within the university would rest with the board of trustees.
- Power and control shift in favor of the administration.
- The administration has a great deal of power in terms of the resources of the institution.
- The power of administrators has grown exponentially in the last generation.
- This administration is the first one to really crack down.
- Speech is controlled by an administrative directive.
- Individual faculty members never really feel that empowered to go beyond their department.
- Institutional control is pretty strong.

As indicated by the quotations, participants indicated that their university wielded a high level of control over the academic speech and that control originated at the highest level of their university and increased over time.

One hundred and sixty-two references were coded from the interviews. As Table 11.6 indicates, the theme correlates positively with the other six prevalent themes; chilling effect (0.97667), outside influence and restrictions on academic freedom (0.97151), faculty governance structure (0.96264), academic freedom - privilege or right (0.95886), academic freedom – intramural and extramural speech (0.95571), and lawfare (0.95239). Based on a matrix coding query of all themes, the theme overlaps the chilling

effect, faulty governance, academic freedom – privilege or right, and outside influence and restrictions on academic freedom themes 27, 27, 26, and 17 times respectively. The university control of academic speech and overlapping themes were strong positive relationships, above r = 0.90. Table 11.8 provides the results of the matrix query. The analysis provides examples from the interviews showing how these themes relate to the university control of academic speech theme.

Table 11.8

Matrix Coding of the Themes That Overlap the University Control of Academic Speech Theme

Themes	Number of overlapping references	Pearson correlation coefficient
Faculty governance structure	27	0.97655
Chilling effect	27	0.96313
Academic freedom - privilege or right	26	0.95836
Outside influence and restrictions on academic freedom	17	0.97124

Faculty governance structures. A public university's ability to control faculty governance structures and be influenced by the faculty senate was discussed by 14 participants. These participants agreed that, since 2000, the ultimate authority for academic decisions rests with the senior administration. As one participant stated, "the ultimate sovereignty rests with the president, the vice provost, the board of trustees [and] the administration in a lot of areas but there is a pathway and a procedure where they're supposed to consider what the faculty senate has to say." Dr. John Blackburn added,

> whether a university experiences full academic freedom, will depend very much on the role of the administration. This is extremely important that, if the administration is supportive of academic freedom and is protective of academic freedom, then academic freedom has a chance and a lot of that will depend upon what the students and the faculty do in that environment. But if the administration is not supportive of it, it's going to be very difficult for faculty and students to actually enjoy academic freedom. So, as idealistic as one can be about academic freedom as a right of the professor, one has to acknowledge how extremely important it is to have an administration that is supportive of that value.

To engage the administration, Dr. Todd DeMitchell stated that the faculty governance structure at his institution provided "an excellent counter-weight for the faculty…through academic freedom, policy, and its expertise to push back and have a good dynamic tension between itself and the administration." But, Dr. Bashara Doumani stated, in the end, the university controls decision-making and the governance structure by

> executive fiat, by picking individuals from the faculty that they know will support their position and put them as head of these committees, or, most often, by deciding what resources to give or to withhold from certain initiatives. That is how they shape the institution. They control the budget.

Dr. Joan Hemmingway reflected,

> we have had campus level and system level officials, since 2000, who really did not believe as strongly in the value of the faculty voice in governance and were more autocratic in their approach. When they had to engage faculty, they did [but only] because they had too. You felt that faculty viewpoints were discounted [and] their communication was not as respectful.

As such, the ultimate authority and control over the academic decisions rested with the administration.

All participants agreed that their faculty senates were advisory in nature and that their decisions were merely considered recommendations to the administration. While the faculty senate members come from the faculty, Dr. Tommy Curry stated, "individual

faculty members never really feel that empowered to kind of go beyond their department." Doumani reasoned, while "senate committees are supposed to have a strong voice in the administration of the university, they make recommendations after long studies and they are either ignored or changed by the administration with no recourse." Dr. Cary Nelson agreed, stating that faculty senates are "a body that expresses opinions [and are] an advisory body to the administration that retains all the final authority and exercises it, sometimes against the will of the senate." As a member of a governance committee at the University of Texas at Austin (UT), Dr. Robert Jensen added that none of the UT faculty governance committees have any power.

> None of them have the ability to make decisions they [can] make stick. They are consulting committees [and] are advisory only. [Their] decisions have no force [and] are recommendations to the president. So, when [the interviewer asked] has faculty governance been affected that implies there is faculty governance and I would argue there is no faculty governance at the University of Texas.

Dr. Michael J. Smith agreed, stating that the faculty senate at his institution "has some formal roles in approving new programs and this and that, but its role in actual governance is largely consultative rather than legislative or dispositive in any serious way." While faculty actively contributed to the governance of their institutions, participants agreed that decisions made by governance committees were not final and are considered recommendations by the administrations.

Chilling effect. The chilling effect caused by universities' control of the governance structure and the hiring of non-tenured faculty was identified by 9 participants as a major factor chilling faculty speech. In his interview, Dr. Cary Nelson (past president of the AAUP) stated, "that over the last generation, the most pervasive

threat to academic freedom on campus has arisen out of the increasing reliance on hiring faculty members off the tenure track, either part-time or full-time contingent faculty." Hemmingway provided her insight on the propagation of non-tenured faculty from the college perspective stating,

> people who are newly entering the positions and ask what is it that I can say; what is it that I should say, what are the restrictions on my speech; how can I get this issue done and not lose my job is sometimes what people will say; or how do I communicate about this and not get the chancellor or the provost or the president or the board or the legislature angry with what I'm about to say because it's contentious.

At the departmental level, Curry reflected that,

> some junior professors without tenure that teach things on post-colonialism, race, etc., are constantly being harassed. They don't feel protected because they don't have tenure. It creates a situation, and they don't know where the department's going to come down on it, so they just don't feel safe anymore making those topics available.

Blackburn provided insight to the change which occurs when faculty move from being non-tenured to tenured. He reflected on situations at his institution in which "professors who have not been tenured remaining silent and who, upon obtaining tenure, have suddenly found a voice." He recalled a "woman who was not on the tenure track was silent…virtually silent. After obtaining tenure, she not only spoke out, but became a leader of a group that stood up for the rights of women." Therefore, tenure provides safeguards that allow faculty to speak and participate in university business openly without fear of reprisal.

But, to protect their future and avoid problems with the university, tenured and non-tenured faculty have also modified their classroom discussion and self-censored themselves. Curry stated that non-tenured "people have…streamlined [their teaching]

and said [that] they are not saying any controversial things until they receive tenure."

Even when tenured, he added,

> [t]his has been a fear of a lot of tenured faculty members [also]. We have had a few [instances] where people are complaining about their third-year reviews despite having an excellent publication record because it's talking about race, racism, things of this sort. Some professors say, look I'm just not teaching X anymore because I don't want to deal with the headache.

Another participant stated.

> the university, aside from one instance, generally does not crack down on faculty's free expression [but that is because], they don't really know half, of what faculty are doing, so it's just a matter of being a little careful. I've really…become more careful in my classes.

As such, faculty are guarded when topics are controversial or political.

Controls over faculty speech derive from internal pressures from both the administration and the students. Curry provided the example of a conservative student group at his institution that policed speech. He stated,

> Texas A&M [has] a very strong student movement with the Young Aggie Conservatives, that in many ways police what professors teach on the university campuses. So there's been a lot of roll back, not so much from actual statements by administrators or deans or faculty, but there's been a lot of social and public pressure to watch what you say, not teach on things that could be perceived [such] as Marxist or anti-state or anti-government.

Providing the administration's view of faculty, Doumani equated the campus environment for faculty to that of a soldier in the army. He stated,

> [p]ublic universities are like the army and the army has a mission and it has its rules and people go into the army knowing what the mission and the rules are and they just can't do or say whatever they want. And that the institution has a right to regulate its faculty just like the army regulates its soldiers.

He added, "[t]hat's a very chilling analogy." For Jensen, these rules and regulations have created artificial barriers that faculty assume they cannot cross. Using a football analogy, he stated,

> if the point at which you are going to be punished for speech is at the 50 yard line. So you're at the goal line and you're figuring how far can I go before they'll punish me? And let's say that in reality you can go all the way to the 50 yard line. I think people internalize a much more stringent standard and they will estimate that they will be punished at the 25 yard line…So they'll only go to the 25 yard line. Even though, there's another 25 yards they could go without even risking punishment. People are so nervous that they internalize that 25 yard line is the mark beyond which you cannot go. As a result, that becomes the defacto place where people stop, even though, they could go further.

Nelson contented that these controls are threatening to the role of faculty and governance at universities nationwide. He stated,

> because of the corporate ideology, you can quibble until the corporation decides on what its policy is and you're expected to snap your heels to and salute. You're expected to sort of follow the corporate line. That is more and more what I think administrators expect of their faculty. Some faculty are resistant and other faculty think it's better to keep their heads down. The fact that so many faculty have no job security obviously enhances the power of administrators to basically rely on faculty self-censorship to keep the faculty quiet.

Dr. Timothy Sheill agreed adding that the universities "take action against people they feel either won't fight back or aren't in a position of enough influence or power." Enforcing this opinion, Blackburn added, "the power conferred in university rule books and taken away from those who are in the classrooms and in the laboratories [who do not have] their rights protected by tenure." These factors contribute to the chilling effect university policies and controls have on academic speech.

Academic freedom–privilege or right. Whether faculty academic speech is a right or a privilege, is directly related to the university's ability to control governance

and punish speech. Dr. Richard Fossey stated that academic freedom is a right and "not a privilege that the university can withdraw." While *Garcetti*'s effect on academic speech has not yet been fully tested, he added,

> [the] case definitely strengthened the institution's hands. Outside of clear academic speech, they've got a lot of power. If the professor's involved in some sort of internal dispute over governance or finances or grants or things like that, the courts are going to be inclined to say, they're speaking in their official capacity and they don't have any First Amendment rights.

Another interviewee agreed, stating, "many courts are arguing that academic freedom as a concept rooted in the First Amendment rests with the university, which is then free to regulate faculty utterances along the range of concern." Doumani added,

> what we see right now is that the image that people have of the universities as these protected castles of free public inquiry, free critical inquiry in which people can really explore with their imagination without any preconditions or restrictions on what they can or cannot say or write or research [doesn't] really exist much anymore.

To coexist, universities and faculty must discuss the overlap between academic and employee speech, rewrite policies, and redefine expectations.

One institution dealt with the effect of *Garcetti* through changes to their policy on faculty speech. After evaluating recent district court decisions, Dr. Donald Downs

> went to [his] University Committee and told them about *Garcetti*. The head of the University Committee …saw the concerns and… he said, let's do something about this. So we worked out a memo and made a proposed amendment to [the policy] that specifically provides protection for faculty members in questioning or criticizing or commenting on university policies, practices and procedures. The University of Minnesota had done this too. We were the two schools I know that did it. We directly dealt with *Garcetti* and it passed the faculty senate unanimously. This is not an easy issue to address at institutions whose administrators are not faculty.

Doumani contended that resolving issues related to who controls academic speech is

> very much a work in progress in the sense that, what we see is a situation in which power has become much more concentrated in the hands of administrators and [that] many of them are no longer coming from the faculty. You have people from the business world now who are running universities, who have no real understanding of the mission of the university, of the concerns of the faculty, or are not part of that culture. Therefore, for them, this idea of academic freedom is strange.

Compounding the issue is the concept that "the institutions that [these people] are running are still built in many ways according to a structure that has absorbed the idea of academic freedom as a privilege through peer review and self-governance." Rooted in the AAUP's 1915 Declaration and 1940 Statement of Principles, these ideals continue to provide guidance to universities and faculty when faced with academic speech issues. But, as more executives and administrators are hired from the corporate or political world, the right to academic freedom has been raised to the institutional level and is granted downward as a privilege to faculty.

Outside influence and restrictions on academic freedom. Universities are influenced by a number of outside entities that pressure board members and administrators to monitor and, in some cases, restrict academic speech on campus. Eight participants discussed entities including elected officials, politicians, corporations, and activist groups who influenced academic freedom at their university. Worth noting is that all the participants' universities had boards that were either all or partially appointed by the Governor with additional membership elected by the board or on-campus participation from business and industry, agricultural organizations, alumni, and student government.

Pressures from politicians and government appointees were cited as the most prevalent influencers of academic speech on campus. At his institution, Curry recognized that the "Board of Regents seems to be very, sympathetic to that view, that people's checks are funding the university and, to a large extent, decide what's being taught at the university." He suggested that "if you took a very general popular poll at Texas A&M, you'd see that…the faculty, in general, feel that the Board of Regents and the politics of the Governor very much control what's done or implemented on the campus." In support, Doumani stated, "the fight for some government funds…makes…administrations very eager not to create any kind of negative image about their university. Therefore, they are not willing to really stand up and defend their faculty." He warned that, "if taken at face value, it really will allow the politicians and university administrators to decide what can or cannot be said on campus." But, this is not the only way influence from outside effects academic speech.

The use of budgets to control on-campus speech was referenced by Downs. This incident occurred at a University of Wisconsin extension campus and resulted from a forum, which used artwork to talk about labor. The exhibit "was all very politicized," as Downs stated, and resulted in "members of the Republican Coalition in the legislature [calling for] the head of that department [to be fired and stating that] if you do this, we will cut your funding." Adding, "budget issues are going to be key in the future in terms of these issues."

Academic freedom–right or privilege. The academic freedom–right or privilege was one of the four research questions addressed in the study. The theme

focused on whether the participants felt that academic freedom was a right provide by the First Amendment or a privilege granted by the university. Follow-up questions considered whether a faculty member's university privilege became a right under the First Amendment when the courts became involved. As Table 11.5 indicates, keywords and phrases identified in the interviews included privilege, individual right, it's a right, not a right, right and responsibility, institutional right, not a private right, and is a right. These keyword and phrases were found in the theme's coded references. Below are quotations from the interviews in which participant discussed academic freedom as right or privilege.

- Now, it seems to be more of a privilege where controversial statements, political statements, ideological statements made by the professor that indirectly increase or enhance the education of the student, could be called into question.
- It's not just the privilege that can be withheld by the institution.
- Tenured professors in flagship universities who have tried to protect themselves under the banner of academic freedom as a privilege are seen as out of touch really with the political economy of knowledge production in higher education these days.
- We are a privileged guild of high-class people who really deserve this.
- It's a right. I think we have the right to, express ourselves on controversial issues that pertain to our scholarship.
- It's a right. I think the courts would uphold it as a First Amendment right similar to the First Amendment right of other public employees.
- It is a right that is under some challenge.
- It's not a right in the sense that it's guaranteed.
- Universities have basically taken the position that academic freedom is an institutional right not a private right.

- It's an institutional right which is the instrumental part of [academic freedom]. The instrumental application of academic freedom actually is through the faculty.

As the quotations indicate, faculty believed that academic freedom is a right, but not a right that is guaranteed or defendable under the First Amendment and not one that allows faculty to speak on political or controversial issues. As such, academic freedom is an institutional right that faculty have through their affiliation with the university.

One hundred and sixteen references were coded from the interviews and 79% of the participants stated that academic freedom was a right, 16% a privilege, and 5% were undecided. Based on a matrix coding query of all themes, the theme overlaps the university control over the academic speech (26), First Amendment (22), lawfare (22), and institutional academic freedom themes (15) times. The academic freedom–right or privilege and overlapping themes were strong positive relationships, above r = 0.90. Table 11.9 provides the results of the matrix query and correlations. The analysis provides examples from the interviews showing how these four themes relate to the academic freedom–right or privilege theme.

Table 11.9

Matrix Coding of the Themes That Overlap the Academic Freedom–Right or Privilege Theme

Theme	Number of overlapping references	Pearson correlation coefficient
University control over the academic speech	26	0.94375
First Amendment	22	0.94966
Lawfare	22	0.94966
Institutional academic freedom	15	0.96048

University control over the academic speech. The participants referenced *Garcetti* as a decisive factor contributing to the increase in the university's control of academic speech. One interviewee stated, "courts are arguing that academic freedom, as a concept rooted in the First Amendment, rests with the university which is then free to regulate faculty utterances along the range of concerns." Fossey concurred stating, "the lower courts have been pretty clear that [academic freedom is] attached to the First Amendment but it's not a free-floating constitutional right." To survive, Blackburn contended,

> full academic freedom will depend very much on the role of the administration [and] the institution. If the administration is supportive and protective of academic freedom, then academic freedom has a chance. But if the administration is not supportive, it's going to be very difficult for faculty to actually enjoy academic freedom. As idealistic as one can be about academic freedom as a right of the professor, one has to acknowledge how extremely important it is to have an administration that is supportive of that value.

While it is not clear yet how *Garcetti* will be applied, Fossey warned, the "case definitely strengthened the institution's hands [and] power." As an example, he added, "if the professor is involved in some sort of internal dispute over governance or finances or grants, the courts are going to be inclined to say, they're speaking in their official capacity and they don't have any First Amendment rights." Academic free speech has yet to be decided by the courts.

Especially vulnerable to university control are non-tenured faculty. Blackburn argued that academic freedom is being challenged by the increased use of adjunct and part-time faculty. He stated, "tenure protects academic freedom [and the] decline in the number of tenured faculty [is causing] a change in the behavior of faculty members

[because non-tenured faculty] simply don't have the same rights that tenure-track faculty members have." Another participant agreed stating, "adjunct faculty instructors and lecturers have no protection." The end result, Downs warned, is "diminish[ed] shared governance [and] academic freedom will give administrations more power and control [which] (a) they like and (b) makes it more economically efficient" for the university to operate. Dr. Neil Hutchins agreed stating, "the academic balance of power is slowly shifting [due to] multiple factors [and the shift is] more subtle [due to] the way that these things all interplay."

First Amendment. Cases such as *Sweezy* (1957) and *Keyeshian* (1967) recognized academic freedom as a special concern of the First Amendment. Faculty, especially tenured faculty, have interpreted the court's concern to mean that their intramural and extramural speech is a right protected by the First Amendment. As the participants acknowledged, these rights are afforded to faculty by contractual agreements, which are administered by the institution, leaving absolute control over the academic speech with the institution. Hutchens acknowledged this situation, saying, "the power of tenure makes [faculty] feel comfortable and, if we're talking in the faculty context, the ability to exercise those First Amendment rights tends to be tied to the contractual arrangements that undergird the faculty-employer relationship." DeMitchell agreed that academic freedom is "a constitutionally based right [that is protected] through a collective bargaining agreement." Deconstructing the relationship between the university and faculty member, he stated, "the faculty don't have academic freedom as a

separate entity, it has academic freedom only through its association and affiliation with the work of the institution." Starting with *Sweezy*, he added,

> Frankfurter's concurring opinion laid out the four elements of academic freedom of the institution. He didn't say that faculty members, individual faculty members, possessed the right to decide who will be taught, who's admitted to study, and what the curriculum will be. In fact, the case is very strongly stated that individual faculty members have no right, no constitutional right to disregard the curriculum. The curriculum is one that becomes the institutions…and the work of the institution cannot get done without the faculty members.

Even though tenure and contractual agreements continue to provide job protection, court decisions are being reinterpreted to give public institutions more control over speech on campus.

Court decisions such as *Garcetti* are reexamining whether academic speech is a protected right of the faculty or a privilege granted to faculty by the institution. While Fossey held that academic freedom was a right, he acknowledged, that "the lower courts have been pretty clear that it's not a free-floating constitutional right." Another participant agreed stating, "many courts are arguing that academic freedom as a concept rooted in the First Amendment rests with the university, which is free to regulate faculty utterances." At his institution, Hutchens stated,

> when I tell [faculty that] there's a lot of legal uncertainty about to what extent the First Amendment protects individual academic freedom, I find people are very surprised. A lot of faculty and campuses still operate under this common assumption that the First Amendment really protects their speech. They don't realize that a lot of these issues are up in the air, legally.

Usually, Doumani contended, faculty "don't understand the version of academic freedom that operates in this country, [don't find out until] they get in trouble and then they start yelling that it's a right." He added,

> When they go to court, they start crying First Amendment because it's much easier to do it that way. But, in so doing, they open themselves up precisely to the kinds of restrictions on the First Amendment that we see happening in this country. Especially with the passage of the Patriot Act, this very conservative Supreme Court, and the much more right wing political culture in this country since the 80s. So they're jumping from the frying pan to the fire in some ways.

Looking forward, Fossey doesn't "think it's clear yet how *Garcetti* is going to be applied to academic speech, but, anything that could be defined as something other than academic speech, well the university's got a lot of power." These decisions have been left to the district courts to decide.

Lawfare. The term lawfare was introduced by Major General Charles Dunlap in 2001 (Waters, 2011). Dunlap defined the term "as the use of law as a weapon of war, later clarifying that it involved 'a strategy of using–or misusing–law as a substitute for traditional military means to achieve an operational objective" (Dunlap, 2009, p. 34). Waters argued that the term has "strayed considerably from its non-partisan ideological roots" (Waters, 2011, p. 329) stating, "political pundits have reshaped [Dunlap's] first definition into…what Wouter Wemer calls 'reflexive lawfare': 'the use of the term to discredit an opponent's reliance on law and legal procedure,' or 'an instrument to discredit critics of the government'" (pp. 329-330). The use of lawfare to determine whether academic freedom is a right of the institution or the faculty continues to evolve as First Amendment cases are decided.

Participants referenced lawfare within the context of the court decisions and laws affecting academic speech. Downs recognized that lawfare was "a real phenomenon occurring" today and that "there is no question that different sources are using the courts to restrict certain policy decisions on the war on terror…and that there is no question

about how [these decisions] are being used against academic freedom." Doumani argued, "the passage of the Patriot Act, the very conservative Supreme Court, and the much more right wing political culture in this country" are precisely the kinds of First Amendment restrictions being implemented today. DeMitchell added,

> I don't believe as a faculty member that I am bereft of academic freedom. I think I have it. I, just, don't think it is this thick, firm pillar upholding the roof over me. I think it tends to be more of a thin reed. It's not one of the things that courts really strongly support.

Adding, "the cases are moving more that way because the Supreme Court that dealt with *Keynesian, Sweezy*, and even *Healy* have basically turned down every opportunity to clearly define what the contours of this essential right are." Dr. Robert O'Neil argued that it wasn't until "Judge O'Scannlain's dissenting opinion in *Garcetti* that there was ever a problem about day-job related speech and, of course, the majority, following Judge O'Scannlain, did to some extent undermine what we had all assumed" about faculty speech at all times being protected. Fossey agreed stating,

> [the] *Garcetti* case definitely strengthened the institution's hands. Outside of clear academic speech, [universities have] a lot of power. If the professor is involved in some sort of internal dispute over governance or finances or grants, the courts are going to be inclined to say, they're speaking in their official capacity and they don't have any First Amendment rights. It's not clear yet how *Garcetti* is going to be applied to academic speech, but, certainly anything that could be defined as something other than academic speech, the university's got a lot of power.

Nelson commented,

> despite Souter's footnote, a number of District Courts have applied *Garcetti* to colleges and universities. While it looked for a while as if faculty speech might be protected, we're not protected now. Of course, district court decisions are binding only in those federal districts, not in the country as a whole. I would not look with confidence about what the current Supreme Court would decide should a case arrive and they accept it.

Participants acknowledged that the recent legal decisions have challenged the Supreme Court's recognition that academic freedom is a special concern of the First Amendment. These decisions have granted universities the right to control employee speech and reduced the ability of the faculty to defend their academic speech both on campus and in the courts.

Institutional academic freedom. All participants agreed that institutions control academic freedom. The amount of academic freedom vested in the institution was discussed within the context of whether the institution had the right to control faculty speech. The institutional academic freedom theme was related to one research question asked during the interviews and addressed in the study. Specifically, what effect does institutional academic freedom have on the faculty's role in the governance structure at your university? Nelson acknowledged that, "the institution has a responsibility to protect its integrity and to make certain that the function of giving unfettered advice to the public is sustained." Maintaining this functionality, DeMitchell recognized, requires institutions to share speech rights with the faculty. He conceptualized that,

> the institution's right of academic freedom is instrumentally met through having faculty members share academic freedom as well. Without the institution having academic freedom, I do not believe the faculty would have it. The institution needs to have the faculty doing the work of faculty which supports its academic freedom, mission, and requirement.

Blackburn added,

> The reality of, of whether a university experiences full academic freedom will depend very much on the role of the administration and the institution. If the administration is supportive of academic freedom and protective of academic freedom, then academic freedom has a chance. But, if the administration is not supportive, it's going to be very difficult for faculty and students to actually enjoy academic freedom.

To maintain a shared and supportive environment, both must realize each other's role and dependencies.

Participants also recognized that past court decisions have been a major factor in supporting academic freedom as an institution's right. Referencing *Sweezy*, DeMitchell stated,

> Frankfurter's concurring opinion laid out the four elements of academic freedom of the institution. He didn't say that faculty members, individual faculty members, possessed the right to decide who will be taught, who's admitted to study, what the curriculum will be. In fact, the case very strongly states that individual faculty members have no right.

Another interviewee agreed, stating

> many courts are arguing that academic freedom as a concept rooted in the First Amendment rests with the university, which is then free to regulate faculty utterances along the range of concern…and, not with individual faculty members. So, you've got to balance these two competing concepts. Whether academic freedom is a right or a privilege doesn't really define what legally will emerge.

Doumani observed that many institutions have "given a lot of thought to this idea of First Amendment as the umbrella for academic freedom and taken the position that academic freedom is an institutional right not a private right." As such they are rewriting and strengthening their academic freedom policies. He warned that "faculty better stick to the idea of [academic freedom as] a privilege because, if they go the First Amendment route, they are not going to stand a chance" in court.

Outside influence and restrictions on academic freedom. The outside influence and restrictions on academic freedom theme focused on the effect of outside, non-university influence that impinges or restricts faculty's academic freedom. As Table 11.5 indicates, keywords and phrases identified in the interviews included ACLU,

AAUP, right-wing, legislator, court, political, legal system, conservative, legislature, Horowitz, donors, newspaper, corporate, republican coalition, and 9/11. These keywords and phrases were found in the theme's coded references. Below are quotations from the interviews in which participants discussed the outside influences affecting academic freedom on their campuses.

- When it comes to campus issues, the ACLU has not always been consistent.
- The Right-Wing Talk Radio machine picked it up in Houston and there was a public outcry against my statement.
- The Arizona State Legislature has introduced a bill that would require all educational institutions in the state, including state universities, to suspend or fire professors who say or do things that aren't allowed on network TV.
- The legislature passed a law requiring all faculty to post their syllabi on line so that the legislature and the public could look at any potentially scandalous content of the classes.
- David Horowitz's campaign against left wing professors was very effective in some ways. He didn't win in legislatures a lot but under the threat of the legislature passing a bill restricting speech, many universities would come up with their own codes of conduct so that it would be under the control of the university and not the legislature.
- After 9/11 and since *Garcetti*, I do think that given the power of the regents and the legislature that people keep their head down.
- It's the corporations, the donors, and the fight for some government funds which makes faculty and administrations very eager not to create any negative image about their university. Therefore, they are not willing to really stand up and defend their faculty.
- The administrations are much more concerned with pleasing corporate and private donors or certain politicians than they are about the quality of education, much less the freedom of their students and faculty.
- The government does only so much right now in governing our lives. The corporate world and industry does an awful lot in governing our lives.

- You get a lot of money from a corporation and you can take on research projects that you could not fund on your own. That's a good thing assuming various restraints on publication and so forth. But, there are a lot of restraints corporations can put on you that are very destructive.

As these quotations indicate, advocacy groups, corporations, donors, news sources, legal decisions, and governmental bodies influence what academic speech on campus is allowed and restricted. While not all are successful, the long-term effects can influence whether the university is willing to defend faculty when their speech becomes an issue.

One hundred and eight references were coded from the interviews. Based on a matrix coding query of all themes, the theme overlaps the chilling effect (29), university control over the academic speech (27), academic freedom right or privilege (12), and academic freedom intramural and extramural speech (11) themes. The relation between outside influence and restrictions on academic freedom and university control over the academic freedom theme was discussed previously. Additional discussion would be redundant. The outside influence and restrictions on academic freedom and overlapping themes have strong positive relationships, above $r = 0.90$. Table 11.10 provides the results of the matrix query and correlations. The analysis provides examples from the interviews showing how these themes relate to the outside influence and restrictions on the academic freedom theme.

Table 11.10

Matrix Coding of the Themes That Overlap the Outside Influence and Restrictions on Academic Freedom Theme

Theme	Number of overlapping references	Pearson correlation coefficient
Chilling effect	19	0.95971
University control over the academic speech	17	0.97653
Academic freedom - privilege or right	12	0.93843
Academic freedom - intramural and extramural speech	11	0.92558

Chilling effect. Seven participants discussed the chilling effect caused by outside influence from legislators, politicians, corporations, and advocacy groups, resulting in perceived or real restrictions on academic freedom. Hemmingway epitomized the environment faculty face today, stating,

> [faculty are asking] what is it that I can say; what is it that I should say; what are the restrictions on my speech; how can I get this issue done and not lose my job; how do I communicate about this and not get the chancellor or the provost or the president or the board or the legislature angry with what I'm about to say because it's contentious or it flies in the face of what some political party or some official might believe to be the best course of action.

Underlying these questions, were key words in the references such as subtle, head down, cautious, and fear that typified the chilling effect to which faculty are exposed. A number of participants discussed examples of methods used by outside entities to intimidate faculty and silence academic speech. These methods included the use of hate mail and public record requests, black lists, pressure to pass restrictive legislation, legislative budget cuts, and pressure from corporations.

Email, websites, and open records requests for electronic information were referenced as sources that are or could be used to threaten and intimidate faculty. For

attempting to defend a fellow faculty member from university censure, one participant acknowledged receiving hate mail, stating, "he and others started to get hate mail and so the backlash went well beyond the university administration but I think it was licensed by the university administration." Curry discussed a conservative advocacy group's use of the Internet at his institution and the pressure exerted on faculty stating,

> [the group] seems to be the independent police who put people on their website. They have the leftist list and, despite people saying that these things don't matter, you see these intimidation tactics [used on] faculty members who speak on issues get repercussions. They're going to request your e-mails, people are going to question you, ask you about your syllabi, and put you on the Internet and on watch lists. That's a lot of pressure in terms of talking about how safe people feel in expressing their opinions or even their scholarly opinions given if, that's the type of social and public lashing they're going to get.

Referencing an incident on his campus in which a faculty member became the focus of political challenge, Smith stated,

> while the university stood up for the faculty, we are warned that all our emails are subject to all regulations that govern public employees. People who, for example, do work on terrorism have to be very careful because somebody could, under the USA Patriot Act, just make an accusation and get your whole computer seized. So, the atmosphere has become one where people are more cautious. I don't think it has stifled robust debate, but we are aware that we are not in a protected zone anymore.

These quotes illustrate the fear that outside entities instill on faculty when tactics such as requests for electronic communication, the seizing of equipment, and the publishing online of information targeted at discrediting academic speech that are used to intimidate faculty.

Lawmaker's influence over legislation and funding decisions were methods discussed for influencing change on campus and silencing academic speech. Doumani

discussed the changing of the academic landscape caused by pressure from private advocacy groups to pass legislation, stating,

> attempts by private advocacy groups such as the David Horowitz group that passed the Students Bill of Rights, on the local and the state level as well as resolutions that are put before the state assemblies, create a very chilling environment for faculty.

One participant discussed the ever-present issue and threat of

> knowing that you are being watched very closely by the legislature in the context of budget cuts, that they're going to try to save money and that they would like nothing more than to turn the university into a vocational academy staffed entirely by at-will employees. So after 911 and since *Garcetti*, I do think that, given the power of the regents and the legislature, people keep their heads down.

Downs provided an example of an incident at the University of Wisconsin extension campus, which resulted in legislator dissatisfaction and pressure being exerted to influence future behaviors.

> The UW Extension at Madison has a division that deals with art and wanted to put on a forum with art about the labor controversy and it became very politicized. As a result, there were members of the Republican Coalition in the legislature that called for the head of that department [chair] and said that, if you do have this forum, we will cut your funding.

Smith referenced another example.

> I think there's been not quite a chilling effect but some greater degree of caution here at Virginia. Most recently having to do with the lawsuit brought by the attorney general against one of our former faculty members in environmental science who was allegedly involved in the so-called hockey stick trick of climate change, the attorney general sued him on a fraud statute, the university defended the professor, and it's still going on because the state is appealing. This happened because we have a local politician who is running against climate change and decided to take it out on this one professor.

As such, public universities and faculty are aware of the tie between that faculty speech, legislation, and funding.

Finally, the corporatization of universities has influenced academic speech. Nelson stated that the "corporate university does not appreciate dissent on policy matters and faculty are increasingly self-censoring on policy matters and cautious and afraid about speaking out." Referencing faculty who were working on British Petroleum funded grants after the Gulf oil spill, he stated,

> the most either amusing or incredible part of BP's restrictions built into their contracts after the Gulf oil spill, was not just the restriction on publication but, that the same restrictions applied to giving an academic paper at a conference. It applied to discussing your research with anybody. They couldn't talk about what they were doing without the lawyers' permission. I think most faculty members would find literally being gagged, more than a little distressing.

He added, faculty are "expected to sort of follow the corporate line and, that's more and more what I think administrators expect of their faculty. While some faculty are resistant, other faculty think it's better to keep their heads down."

University control of academic speech. The relationship of the outside influence and restrictions on academic freedom and university control of academic freedom themes were discussed previously. The discussion is repeated for the reader's convenience.

Universities are influenced by a number of outside entities that pressure board members and administrators to monitor and, in some cases, restrict academic speech on campus. Eight participants discussed entities including elected officials, politicians, corporations, and activist groups who influenced academic freedom at their university. Worth noting is that all the participants' universities had boards that were either all or partially appoint by the Governor with additional membership elected by the board or

on-campus participation from business and industry, agricultural organizations, alumni, and student government.

Pressures from politicians and government appointees were cited as the most prevalent influencers of academic speech on campus. At his institution, Curry recognized that the "Board of Regents seems to be very, sympathetic to that view, that people's checks are funding the university and, to a large extent, decide what's being taught at the university." He suggested that "if you took a very general popular poll at Texas A&M, you'd see that…the faculty, in general, feel that the Board of Regents and the politics of the Governor very much control what's done or implemented on the campus." In support, Doumani stated, "the fight for some government funds…makes…administrations very eager not to create any kind of negative image about their university. Therefore, they are not willing to really stand up and defend their faculty." He warned that, "if taken at face value, it really will allow the politicians and university administrators to decide what can or cannot be said on campus." But, this is not the only way influence from outside effects academic speech.

Downs referenced the use of budgets to control on-campus speech. This incident occurred at a University of Wisconsin extension campus and resulted from a forum, which used artwork to talk about labor. The exhibit "was all very politicized," as Downs stated, and resulted in "members of the Republican Coalition in the legislature [calling for] the head of that department [to be fired and stating that] if you do this, we will cut your funding." Adding, "budget issues are going to be key in the future in terms of these issues."

Academic freedom–right or privilege. The influence that outside entities such as corporations and the courts have on academic freedom was discussed by eight of the participants. Doumani contended that universities are being run by people hired from the private sector who do not understand academic freedom. He observed that,

> the number of administrators, the salaries of administrators, and the power of administrators has grown exponentially in the last generation and they are no longer coming from the faculty. Now, you have people from the business world running universities who have no real understanding of the mission of the university, of the concerns of the faculty, and are not part of that culture. For them, this idea of academic freedom is strange.

Other participants recognized that legislators and court decisions were influencing the argument of whether academic freedom was a right or privilege. DeMitchell stated, "we have a very activist, very conservative legislature." But, he added, "they're not going after academic freedom, per se, and there hasn't been any legislation that I can recall that would target a diminution of academic freedom." Downs agreed stating,

> the academic freedom challenges during the heyday of so-called political correctness still happen. But it's toned down a lot compared to what it used to be. There's been a rise of more traditional threats, coming from the right and from outside. I think academic freedom is more accepted now on campus than it was 15-20 years ago. Though it's still embattled, it's doing better than it was.

Smith argued that it is not legislation but rather that the courts have the most influence over academic freedom. Disappointed, he stated,

> I'm not particularly optimistic about the courts protecting [academic freedom] as a right. Courts have never been all that consistent in their view of it. What academic freedom is based on and how strong it is, is very much a case-by-case thing. There's some very high-minded rhetoric you can find in some cases and in some cases you don't find such high-minded rhetoric.

Another participant added, "courts would say that it is a concept that rests with the institution itself and, not with individual faculty members. [Institutions need] to balance these two competing concepts" without sacrificing faculty academic freedom.

Academic freedom–intramural and extramural speech. The theme focused on the effect non-university entities have on the intramural and extramural speech of faculty. These entities include public opinion, legislators who require transparency on materials used in the classroom, and conservative advocacy groups who monitor classroom speech. Jensen discussed his experiences with these entities and responded to their efforts to restrict his speech.

On September 12, 2001, Jenson published an essay in the Houston Chronicle, *Stop the Insanity Here*, in which he critiqued the possibility of a military response to the 9/11 attacks. As a result, he was chastised by the University of Texas at Austin's President Larry Faulkner. It was the first time that he could remember that a university president "condemned him by name for his extramural political writing which does by nature of his position [as a Journalism faculty member] impact academic freedom." In turn, he questioned the "appropriateness of the chief officer of the university to make comments in response to a public outcry that publicly humiliated or attempted to publicly humiliated and ridicule a faculty member" for his speech. While many of his colleagues supported his right to extramural speech, many remained quiet.

Jensen's thoughts on the Texas legislation requiring faculty to publish their syllabi and vitae online and conservative advocacy groups provided insight into the faculty's role as a public employee and professional. He stated,

> when the state law kicked in stating that we all have to put our syllabi and COV's online, I was quite frankly shocked that faculty found this disturbing. I teach in the public university and if I'm not willing to put my syllabus in public I should quit and go home. I thought that outcry about putting syllabi online was really absurd. Number one I don't think there was a principle that could be defended there and number two it made faculty look like a whiny self-indulgent crybabies. If you can't defend your syllabus, you don't have any business teaching. I thought that was totally over blown.

On the issue of conservative advocacy groups monitoring his classes, he added,

> [i]f students want to come in and sit in my course even though they're not enrolled that's fine with me. If the conservative students to bust radical professors or whatever the group might be called wanted to station a permanent monitor in my classroom, I would invite. Why not? Again, if I can't defend my teaching on intellectual grounds then I have no business being in the classroom. I continued to teach critical material and I teach it in ways that I think are pedagogically sound.

In Mississippi, one participant cautioned, "we've got a fairly tightly structured constitutional board that is sensitive to a range of issues, including the ability of the faculty to speak freely." Neither Jensen or the participant felt threatened by outside influences but both had contractual protections of their academic freedom based on their tenured position.

Faculty governance structure. The faculty governance structure theme related to two research questions asked during the interviews and addressed in the study. Specifically,

- In what ways do the faculty governance structures at your institution respond when challenges to faculty intramural and extramural speech occur?
- What effect does institutional academic freedom have on the faculty's role in the governance structure at your university?

The theme focused on the shared governance structures such as the faculty senate and tenure and promotion committee in which faculty discuss academic issues, develop

academic policy, and hear concerns of the university. As Table 11.5 indicates, keywords and phrases identified in the interviews included shared, faculty governance, faculty senate, committee, governance structure, co-governance, governance model, and campus governance. These keyword and phrases were found in the theme's coded references. Below are quotations from the interviews in which the participants discussed their governance structures and the influence that the framework has when academic decisions are made.

- There's one area where the faculty senate has complete governance and that is curriculum.
- The faculty senate will weigh in on issues when they believe that academic freedom or shared governance is being implicated by actions or pronouncements on the part of the administration.
- If we can diminish shared governance, if we can diminish academic freedom, that's going to give the administrations more power and control and (a) they like that, and (b) it makes it more economically efficient maybe.
- The faculty senate, when it wants to, has some power because we have shared governance. Shared governance in Wisconsin is mandated by law. It's in our state statutes.
- Because of the model of faculty governance, our faculty senate is an advisory body to administration, but it is well heard and often well-spoken. The institution or the administration recognizes the role of the faculty senate and embraces at various turns.
- At the university, I would argue that our culture is strong with regard to academic freedom issues and the rights of the faculty, even though our faculty senate is an advisory body.
- They're just recommendations that the faculty council make to the president. The president takes them under advisement but they have no binding force.

All but one participant stated that their faculty senate was an advisory committee that made recommendations to the administration. While all participants stated that their

administrations usually accepted the faculty senate's recommendations, they understood that the university controlled which recommendations would be accepted or rejected.

One hundred and four references were coded from the interviews. Based on a matrix coding query of all themes, the theme overlaps the university control over the academic speech (27), academic freedom right or privilege (8), outside influence and restrictions on academic freedom (7), and faculty activism on campus (6) themes. The faculty governance structure and overlapping themes have strong positive relationships, above r = 0.90. Table 11.11 provides the results of the matrix query and correlations. The analysis provides examples from the interviews showing how these themes relate to the faculty governance structure theme.

Table 11.11

Matrix Coding of the Themes That Overlap the Faculty Governance Structure Theme

Theme	Number of overlapping references	Pearson correlation coefficient
University control Over the academic speech	27	0.96310
Academic freedom - privilege or right	8	0.90569
Outside influence and restrictions on academic freedom	7	0.94190
Faculty activism on campus for academic freedom	6	0.90198

University control of academic speech. The relationship of the faculty governance structures and university control of academic freedom themes were discussed in the university control over the academic freedom theme previously. The discussion is repeated for the reader's convenience.

A public university's ability to control faculty governance structures and be influenced by the faculty senate was discussed by 14 participants. These participants agreed that, since 2000, the ultimate authority for academic decisions rests with the senior administration. As one interviewee stated, "the ultimate sovereignty rests with the president, the vice provost, the board of trustees [and] the administration in a lot of areas but there is a pathway and a procedure where they're supposed to consider what the faculty senate has to say." Blackburn added,

> whether a university experiences full academic freedom, will depend very much on the role of the administration. This is extremely important that, if the administration is supportive of academic freedom and is protective of academic freedom, then academic freedom has a chance and a lot of that will depend upon what the students and the faculty do in that environment. But if the administration is not supportive of it, it's going to be very difficult for faculty and students to actually enjoy academic freedom. So, as idealistic as one can be about academic freedom as a right of the professor, one has to acknowledge how extremely important it is to have an administration that is supportive of that value.

To engage the administration, DeMitchell states that the faculty governance structure at his institution provided "an excellent counter-weight for the faculty…through academic freedom, policy, and its expertise to push back and have a good dynamic tension between itself and the administration." But, Doumani states, in the end, the university controls decision-making and the governance structure

> either through executive fiat, by picking individuals from the faculty that they know will support their position and put them as head of these committees, or, most often, by deciding what resources to give or to withhold from certain initiatives. That is how they shape the institution. They control the budget.

Hemmingway reflects,

> we have had campus level and system level officials, since 2000, who really did not believe as strongly in the value of the faculty voice in governance and were more autocratic in their approach. When they had to engage faculty, they did [but only] because they had too. You felt that faculty viewpoints were discounted [and] their communication was not as respectful.

As such, the ultimate authority and control over the academic decisions rested with the administration.

All participants agreed that their faculty senates were advisory in nature and that their decisions were merely considered recommendations to the administration. While the faculty senate members come from the faculty, Curry stated, "individual faculty members never really feel that empowered to kind of go beyond their department." Doumani reasoned that, while "senate committees are supposed to have a strong voice in the administration of the university, they make recommendations after long studies and they are either ignored or changed by the administration with no recourse." Nelson agreed stating that faculty senates are "a body that expresses opinions [and are] an advisory body to the administration that retains all the final authority and exercises it, sometimes against the will of the senate." As a member of a governance committee at the University of Texas at Austin (UT), Jensen added that none of the UT faculty governance committees have any power.

> None of them have the ability to make decisions they [can] make stick. They are consulting committees [and] are advisory only. [Their] decisions have no force [and] are recommendations to the president. So, when [the interviewer asked] has faculty governance been affected that implies there is faculty governance and I would argue there is no faculty governance at the University of Texas.

Smith agreed, stating that the faculty senate at his institution "has some formal roles in approving new programs and this and that, but its role in actual governance is largely consultative rather than legislative or dispositive in any serious way." While faculty actively contributed to the governance of their institutions, participants agreed that decisions made by governance committees were not final and considered recommendations by the administrations.

Academic freedom–right or privilege. The ability of the faculty to use their university's governance structure to support academic freedom was discussed by three participants. At the University of Wisconsin (UW), Downs reported a strong commitment for academic freedom, stating, "in the last 15 years, we've had a very successful academic freedom, free speech movement that I'm the head of right now since 2000." He said that, when *Garcetti* was hand down, UW's governance structure acted proactively to address it, adding,

> I went to the University Committee and I told them about *Garcetti*. The head of the University Committee was very concerned about academic freedom. He saw the concerns. I talked about some of the lower court cases since *Garcetti* and he said; let's do something about this. So we worked out a memo and made a proposed amendment to the FP&P section that specifically provides protection for faculty members in questioning or criticizing or commenting on university policies, practices and procedures. We added the word "individual" to FP&P, Chapter 8, to try to emphasize that as well. So, we directly dealt with *Garcetti* and it passed the faculty senate unanimously.

At his institution, Blackburn provided an example of the department's ability to address and support faculty members' academic freedom without involving the university's governance committees stating,

> I have heard of cases where a member of the committee stated that a company complained to the chair of her department about some research that a professor was doing. The chair of the department stood up for her and protected her academic freedom.

He was not "aware of any cases that have become a major issue for the Committee on Academic Freedom and Responsibility. They are being handled by department chairs and deans in such a way that they have not garnered a lot of attention" by the committee.

Outside influence and restrictions on academic freedom. Participants identified that much of the influence from outside of the university came from legislators, donors, and politicians. Five participants commented on their experiences. Doumnani catalyzed all these influences stating,

> there is definitely a sense among faculty and students that the foundations of public universities are being eroded by the fact that the states are not putting money into the system, by the fact that there are political restrictions being demanded under the banner of accountability of faculty and administrations, and by the fact that the administrations, themselves, are much more concerned with pleasing corporate or private donors or certain politicians than they are about the quality of education, much less the freedom of their students and faculty.

At his university, Curry commented on the pressure from the legislature to change the institution's educational mission stating,

> Unfortunately, it's one of those things where everybody complains that the Board of Regents and the Governor are trying to turn this into Rick Perry community college. That's a constant saying by faculty members on campus. But in terms of what our governing body has done to gut the faculty senate, I'm not sure because I've only been here for three years.

Another participant agreed stating,

> the governance structure is not at all democratic at the university. There is a faculty council but it has an advisory capacity only. It passes resolutions that the

> president and regents can consider at will. The faculty council has passed resolutions in support of academic freedom in the past, but I know the administration is pressured from the outside.

These influences were not the same at other universities.

Downs provided an example to discuss his institution's support of faculty academic freedom in the face of legislative and political pressure to silence a faculty member. In 2006, the University of Wisconsin at Madison was involved in a controversy caused by allowing Kevin Barrett, a part-time lecturer and 9/11 conspiracy theorist, to teach a course on Islam history and culture in which the war on terror would be discussed. The decision to allow the course to be taught resulted in condemnation by politicians and legislators (Ruethling, 2006). Commenting on the situation, Downs reported,

> his group, the Committee for Academic Freedom and Rights, met with the provost, who would have made the decision on what to do about Barrett's class. We said, look, unless there is evidence that he's done something beyond the pale in terms of academic freedom, he shouldn't be terminated and he was not. It was a very controversial case. My group wrote a piece that was on the university's web page, defending the university's decision. I got attacked from both sides on this thing all over because I also was on record for not agreeing with anything that Barrett believed. But, you had both democrats and republicans calling for him to be terminated.

Working together, the administration and the university's governance committee were able to support each other.

Faculty activism on campus for academic freedom. Participants reported that faculty governance structures were ineffective in defending academic freedom due to a number of factors. Dr. Jerry Kapus reported that the meeting schedule of his faculty

senate resulted in a delay in their ability to immediately react to academic freedom issues. Referencing an incident at his university, he stated,

> [t]he situation that occurred last fall was all resolved within a couple of weeks. Our faculty senate only meets once a month and, I don't think our faculty senate made an official statement because the issue had pretty much been taken care of by the time they would have put something together and made a statement.

Instead, he added "a lot of people just directly sent emails to our chancellor expressing their concerns." Even when issues are brought to the faculty senate, Smith stated,

> there aren't searing debates on university issues on the floor of the senate. They tend to be rather polite affairs where we're consulted about policies that have largely been decided on. So, there's no tradition of strong faculty governance here, even within the schools or the university as a whole. The futility response is the more characteristic response among the faculty, in my view.

He added,

> it's a bit of a chicken and egg thing here, in the sense that you can try to get involved as a faculty member, but you're really up against this long tradition of polite consultation followed by doing what they wanted to do in the first place. So, you often feel as though you are an extra in a very large production when you're in the faculty senate. You're assembled, you are given the illusion of consultation and then we play our part to a degree but it's not the way I imagined a vital, self-governing institution should run.

At his institution, Sheill added, "in regard to challenging administrative decisions or challenging administrators, a lot of that goes on in the hallways with people you feel safe with. There isn't very much in a faculty senate meeting challenging or questioning of administration."

Chilling effect. The chilling effect theme focused on the shared governance structures within the university in which faculty discuss academic issues, develop academic policy, and hear concerns from groups such as the faculty senate and tenure and promotion committee. As Table 11.5 indicates, keywords and phrases identified in

the interviews included chill, silence, repress, heads down, subtle, fear, reluctance, guarded, harassed, radar, exclusion, oppress, cautious, altered, and censor. These keyword and phrases were found in the theme's coded references. Below are quotations from the interviews in which 15 participants discussed the influences that are chilling academic speech.

- Public universities are just like the army. The army has a mission and rules and people go into the army knowing what the mission and the rules are. They just can't do or say whatever they want. The institution has a right to regulate its faculty just like the army regulates its soldiers. That's a very chilling analogy.

- There's going to be a natural chilling effect, which is somewhat just sort of called manners. Within bounds, that's fine. The problem is when it goes further and the organized constituencies are willing to be offended too quickly.

- I think there's been not quite a chilling effect but some greater degree of caution here at Virginia.

- The faculty role on governance is threatened because of the corporate ideology. In a corporation, you can quibble until the corporation decides on what its policy is. Then you're expected to snap your heels to and salute. You're expected to sort of follow the corporate line. That's more and more what I think administrators expect of their faculty. Some faculty are resistant and other faculty think it's better to keep their heads down. The fact that so many faculty have no job security obviously enhances the power of administrators to basically rely on faculty self-censorship to keep the faculty quiet.

- I do think that given the power of the regents and the legislature that people keep their head down.

- I would have to say that people have not altered their intramural and extramural speech.

- Many people feel that the environment in the campus is not conducive to free speech. So, there's a bit of concern and fear, especially among faculty that are not secure in their position. These are the contingent faculty instructors, the adjunct graduate student teachers, and non-tenured faculty. So, this is

> where a lot of the real action is in this kind of opaque environment of self-censorship.

As the quotations highlight, participants stated that they were cautious about their speech and aware of the university's ability to control it. They also recognized that tenure was an important factor in their ability to speak openly without repercussion and that faculty who were not tenured censored and chilled their speech.

Ninety-nine references were coded from the interviews. Based on a matrix coding query of all themes, the theme overlaps the university control over the academic speech (27), outside influence and restrictions on academic freedom (19), academic freedom – intramural and extramural speech (10), and lawfare (8) themes. The chilling effect and overlapping themes have strong positive relationships, above r = 0.90. Table 11.12 provides the results of the matrix query and correlations. The analysis shows how these themes relate to the chilling effect theme.

Table 11.12

Matrix Coding of the Themes That Overlap the Chilling Effect Theme

Theme	Number of overlapping references	Pearson correlation coefficient
University control Over the academic speech	27	0.97652
Outside influence and restrictions on academic freedom	19	0.95969
Academic freedom - intramural and extramural speech	10	0.96490
Lawfare	8	0.93143

University control over the academic speech. The relationship of the chilling effect and university control of academic freedom themes were discussed previously. The discussion is repeated for the reader's convenience.

The chilling effect caused by university's control of the governance structure and the hiring of non-tenured faculty was identified by nine participants as a major factor chilling faculty speech. In his interview, Dr. Cary Nelson (part president of the AAUP) stated, "that over the last generation, the most pervasive threat to academic freedom on campus has arisen out of the increasing reliance on hiring faculty members off the tenure track, either part-time or full-time contingent faculty." Dr. Joan Hemmingway provided her insight on the propagation of non-tenured faculty from the college perspective stating,

> people who are newly entering the positions and ask what is it that I can say; what is it that I should say, you know, what are the restrictions on my speech; how can I get this issue done and not lose my job is sometimes what people will say; or how do I communicate about this and not get the chancellor or the provost or the president or the board or the legislature angry with what I'm about to say because it's contentious.

At the departmental level, another participant, Curry reflected that,

> some junior professors without tenure that teach things on post-colonialism, race, etc., are constantly being harassed. They don't feel protected because they don't have tenure. It creates a situation, and they don't know where the department's going to come down on it, so they just don't feel safe anymore making those topics available.

Blackburn provided insight to the change which occurs when faculty move from being non-tenured to tenured. He reflected on situations at his institution in which "professors who have not been tenured remaining silent and who, upon obtaining tenure, have suddenly found a voice." He recalled a "woman who was not on the tenure track was

silent…virtually silent. After obtaining tenure, she not only spoke out, but became a leader of a group that stood up for the rights of women." Therefore, tenure provides safeguards that allow faculty to speak and participate in university business openly without fear of reprisal.

But, to protect their future and avoid problems with the university, tenured and non-tenured faculty have also modified their classroom discussion and self-censored themselves. Curry stated that non-tenured "people have…streamlined [their teaching] and said [that] they are not saying any controversial things until they receive tenure." Even when tenured, he added,

> [t]his has been a fear of a lot of tenured faculty members [also]. We have had a few [instances] where people are complaining about their third-year reviews despite having an excellent publication record because it's talking about race, racism, things of this sort. Some professors say, look I'm just not teaching X anymore because I don't want to deal with the headache.

Another participant stated that "the university, aside from that one instance, generally does not crack down on faculty's free expression [but that is because], they don't really know half, of what faculty are doing, so it's just a matter of being a little careful. I've really…become more careful in my classes." Faculty are still guarded when topics are or become controversial or political.

Controls on faculty speech derive from internal pressures from both the administration and the students. Curry provided the example of a conservative student group at his institution that policed speech. He stated,

> Texas A&M [has] a very strong [conservative] student movement…that in many ways polices what professors teach on the university campuses. So there's been a lot of roll back, not so much from actual statements by administrators or deans or faculty, but there's been a lot of social and public pressure to watch what you say, not teach on things that could be perceived [such] as Marxist or anti-state or anti-government.

Providing the administration's view of faculty, Doumani equated faculty's current campus environment to that of a soldier in the army. He stated,

> [p]ublic universities are like the army and the army has a mission and it has its rules and people go into the army knowing what the mission and the rules are and they just can't do or say whatever they want. And that the institution has a right to regulate its faculty just like the army regulates its soldiers.

He added, "[t]hat's a very chilling analogy." For Jensen, these rules and regulations have created artificial barriers that faculty assume they cannot cross. Using a football analogy, he stated,

> if the point at which you are going to be punished for speech is at the 50-yard line. So you're at the goal line and you're figuring how far can I go before they'll punish me? And let's say that in reality you can go all the way to the 50-yard line. I think people internalize a much more stringent standard and they will estimate that they will be punish at the 25-yard line…So they'll only go to the 25-yard line. Even though, there's another 25 yards they could go without even risking punishment. People are so nervous that they internalize that 25-yard line is the mark beyond which you cannot go. As a result, that becomes the defacto place where people stop, even though, they could go further.

Nelson contented that these controls are threatening to the role of faculty and governance at universities nationwide. He stated,

> because of the corporate ideology, you can quibble until the corporation decides on what its policy is and you're expected to snap your heels to and salute. You're expected to sort of follow the corporate line. That is more and more what I think administrators expect of their faculty. Some faculty are resistant and other faculty think it's better to keep their heads down. The fact that so many faculty have no job security obviously enhances the power of administrators to basically rely on faculty self-censorship to keep the faculty quiet.

Sheill agreed adding that the universities "take action against people they feel either won't fight back or aren't in a position of enough influence or power." Enforcing this opinion, Blackburn added, "the power conferred in university rule books and taken away from those who are in the classrooms and in the laboratories [who do not have] their rights protected by tenure." These factors contribute to the chilling effect university policies and controls have on academic speech.

Outside influence and restrictions in academic freedom. The relationship of the chilling effect and outside influence and restrictions in academic freedom themes were discussed previously. The discussion is repeated for the reader's convenience.

Seven participants discussed the chilling effect that was caused by outside influence from legislators, politicians, corporations, and advocacy groups, resulting in perceived or real restrictions on academic freedom. Hemmingway epitomized the environment faculty face today, stating, faculty are asking

> What is it that I can say? What is it that I should say? What are the restrictions on my speech? How can I get this issue done and not lose my job? How do I communicate about this and not get the chancellor or the provost or the president or the board or the legislature angry with what I'm about to say because it's contentious or it flies in the face of what some political party or some official might believe to be the best course of action?

Underlying these questions, were key words in the references such as subtle, head down, cautious, and fear that typified the chilling effect to which faculty are exposed. A number of participants discussed examples of methods used by outside entities to intimidate faculty and silence academic speech. These methods included the use of hate mail and public record requests, black lists, pressure to pass restrictive legislation, legislative budget cuts, and pressure from corporations.

Email, websites, and open records requests for electronic information were referenced as sources that are or could be used to threaten and intimidate faculty. For attempting to defend a fellow faculty member from university censure, one participant acknowledged receiving hate mail stating, "he and others started to get hate mail and so the backlash went well beyond the university administration but I think it was licensed by the university administration." Curry discussed a conservative advocacy group's use of the Internet at his institution and the pressure exerted on faculty stating that the group

> seems to be the independent police who put [faculty] on their website. They have the leftist list and, despite people saying that these things don't matter, you see these intimidation tactics [used on] faculty members who speak on issues get repercussions.

Adding,

> they're going to request your e-mails,…question you, ask you about your syllabi, and put you on the Internet and on watch lists. That's a lot of pressure in terms of talking about how safe people feel in expressing their opinions or even their scholarly opinions given if that's the type of social and public lashing they're going to get.

Referencing an incident on his campus in which a faculty member became the focus of political challenge, Smith stated,

> while the university stood up for the faculty, we are warned that all our emails are subject to all regulations that govern public employees. People who, for example, do work on terrorism have to be very careful because somebody could, under the USA Patriot Act, just make an accusation and get your whole computer seized. So, the atmosphere has become one where people are more cautious. I don't think it has stifled robust debate, but we are aware that we are not in a protected zone anymore.

These quotes illustrate the fear that outside entities instill on faculty when tactics such as requests for electronic communication, the seizing of equipment, and the publishing online of information targeted at discrediting academic speech that are used to intimidate faculty.

Lawmaker's influence over legislation and funding decisions were methods discussed for influencing change on campus and silencing academic speech. Doumani discussed the changing of the academic landscape caused by pressure from private advocacy groups to pass legislation, stating,

> attempts by private advocacy groups such as the David Horowitz group that passed the Students Bill of Rights, on the local and the state level as well as resolutions that are put before the state assemblies, create a very chilling environment for faculty.

One participant discussed the ever-present issue of

> knowing that you are being watched very closely by the legislature in the context of budget cuts, that they're going to try to save money and that they would like nothing more than to turn the university into a vocational academy staffed entirely by at-will employees, is always a threat. So after 911 and since *Garcetti*, I do think that, given the power of the regents and the legislature, people keep their heads down.

Downs provided an example of an incident at the University of Wisconsin extension campus, which resulted in legislator dissatisfaction and pressure being exerted to influence future behaviors.

> The UW Extension at Madison has a division that deals with art and wanted to put on a forum with art about the labor controversy and it became very politicized. As a result, there were members of the Republican Coalition in the legislature that called for the head of that department [chair] and said that, if you do have this forum, we will cut your funding.

Smith references another example.

> I think there's been not quite a chilling effect but some greater degree of caution here at Virginia. Most recently having to do with the lawsuit brought by the attorney general against one of our former faculty members in environmental science who was allegedly involved in the so-called hockey stick trick of climate change, the attorney general sued him on a fraud statute, the university defended the professor, and it's still going on because the state is appealing. This happened because we have a local politician who is running against climate change and decided to take it out on this one professor.

As such, public universities and faculty are aware of the tie between that faculty speech, legislation, and funding.

Finally, the corporatization of universities has influenced academic speech. Nelson stated that the "corporate university does not appreciate dissent on policy matters and faculty are increasingly self-censoring on policy matters, cautious and afraid about speaking out." Referencing faculty who were working on British Petroleum funded grants after the Gulf oil spill, he stated

> the most either amusing or incredible part of BP's restrictions built into their contracts after the Gulf oil spill, was not just the restriction on publication but, that the same restrictions applied to giving an academic paper at a conference. It applied to your discussing your research with anybody. They couldn't talk about what they were doing without the lawyers' permission. I think most faculty members would find literally being gagged, more than a little distressing.

He added, faculty are "expected to sort of follow the corporate line and, that's more and more what I think administrators expect of their faculty. While some faculty are resistant, other faculty think it's better to keep their heads down."

Academic freedom–intramural and extramural speech. The chilling of intramural and extramural speech was discussed by four of the participants. The reasons

stemmed from faculty fear of being unemployed or singled out for their activities. From a political standpoint, Jensen contended,

> I don't think that it has anything to do with political fallout of 9/11, questions about war and peace, or public speaking about controversial issues. I think the reason that there's been a change is because of economic realities. There is an oversupply of faculty in almost every field. That oversupply is most dramatic in the traditional humanities and liberal arts, English, history, philosophy. An oversupply of labor and a contracting economic base for higher education. That equals fear and fear equals conformity. So, people are probably less willing to step out either in public or internal to the university and ask critical questions either about public policy or about the internal working of the university, not because of traditional repression or you know political suppression of people's speech but because people are just afraid that during lean times, nobody's safe. That includes not just untenured or contingent faculty but everybody, and it percolates up to tenured and full professors.

As a result, participants have curtailed their activities to reduce their exposure. One participant stated that "the climate really changed," "faculty were worried," and "the pressures of the faculty about academic freedom are subtle." Adding,

> I have become more careful in my classes to make sure that I am including open perspectives and making formal changes to my methods of getting students involved so they hear a different voice, not just one. Many of us have become more careful and flexible in the classroom. I don't think that's necessarily horrible, but it is kind of a chilling climate thing.

To stay under the radar, Smith stated that he thought "there was an awareness that all our emails can be subpoenaed at any moment [which has resulted in] a greater degree of caution than what you would ideally like in an atmosphere of full academic freedom."

Lawfare. Doumani cited the use of laws and legislation to wage war on academic freedom as a way "to silence faculty and silence free speech." Specifically, the *Hong* decisions resulted in the University of California at Riverside faculty senate sending a

warning to their members. Nelson reflected,

> shortly after the *Hong* decision, the faculty senate at the University of California, Riverside issued a memo to all faculty members saying, in the light of the *Hong* decision, that you better watch yourself. You may want to hesitate or withhold comments on shared governance because you're not protected anymore. I mean that was a pretty good warning sign that faculty members were vulnerable.

He added that, "*Garcetti* is a decision that has yet to play itself out on campus in its full implications or consequences."

Control of both the student admission and curriculum management processes were also areas causing faculty to curtail their speech. One participant reflected on a visit from the university's legal counsel that resulted from the topics that he had discussed with potential students. He stated,

> After *Grutter*, we breathed a heavy sigh of relief. But, it wasn't long after that I got a visit from the Office of Legal Affairs at the university. They asked for a meeting with me, sat me down, and asked me how I was talking about the recruitment of minority students. I said that I believed that we could ask people what their race and ethnicity were, that we could consider those factors in our decision making, and that we could take into account historical exclusions, historical barriers in terms of standardized testing and so on. They're like hold it, hold it, hold it, hold it. You cannot talk anything about history, can't talk about redress, can't talk about balancing out underrepresented group. You can only talk about diversity as the good that will come out of recruiting minority students.

Concerning the control of the curriculum, Doumani discussed changes that have chilled speech nationally. He contended that,

> the push through of legislation on the federal, state, or local level, laws or resolutions is an attempt to control what and how international studies are done at the university through federally funded Title VI programs such as the Title VI Centers. That is an attempt to tell faculty that we want to make sure that what you say in class passes muster.

Smith cautioned that this also applied to faculty doing research, stating,

> people who work on terrorism have to be very careful because, under the USA Patriot Act, somebody can just make an accusation and get your whole computer seized. So, I think that the atmosphere has become one in which people are just more cautious.

One participant added, "the legal precedents are alarming at public institutions because to speak out against your employer is not protected." These restrictions continue to shift the boundaries of academic speech and their rights as citizens.

Academic freedom–intramural and extramural speech. The academic freedom–intramural and extramural speech was one of the four research questions to be addressed in the study. The theme focused on the ways faculty governance structures respond when challenges to faculty intramural and extramural speech occur. As Table 11.5 indicates, keywords and phrases identified in the interviews included intramural, extramural, in-class, on-campus, off-campus, and controversial speech. These keyword and phrases were found in the theme's coded references. Below quotations from the interviews in which participants discussed what affected their intramural and extramural academic freedom.

- A lot of faculty have this assumption that the First Amendment protects what happens in the classroom in an intramural or extramural sense. When I talk to a lot of faculty, they don't really have a sense of the legal debate going on.
- The faculty senate has never addressed an administrative challenge or decision regarding a faculty member's extramural speech.
- The only guarantee that the campus will hold a faculty member harmless for extramural speech or speech off the campus, is the notion that academic freedom is a right that's held by faculty members.

- If you publish your ass off, they don't care what you do. They won't care because you are bringing credit to the university. Publishing in your field, and establishing your reputation is really my strategy. Basically fly under the radar by being extra good at our jobs.

- I think there has been a change but I don't think it has anything to do with political fallout of 9/11 or questions about war and peace or public speaking about controversial issues. I think the reason there's been a change is because of economic realities.

- I think universities have the authority to require professors to stay on point, to teach the course that's been assigned to them to teach, not to inject their religious views, not to curse gratuitously at their students, and not to sexually harass them. Professors who think that there are no constraints on them in the classroom, I don't think that's correct.

- I teach whatever I want in the classroom and I have never had any concerns that this is too controversial a topic.

- People are probably less willing to step out either in public or internal to the university and ask critical questions either about public policy or about the internal working of the university, not because of traditional repression or you know political suppression of people's speech but because people are just afraid that during lean times, nobody's safe. That includes not just untenured or contingent faculty but everybody and it percolates up to tenured and full professors.

Participants recognized that the academic landscape had changed but did not attribute the change to any single event such as 9/11. Legal decisions such as *Garcetti*, economic issues resulting from reduced funding, and corporate research interests were the main factors influencing their extramural or intramural speech. Given all the participants were tenured, they stated that their speech had not been constrained or restricted by their institutions.

Seventy-five references were coded from the interviews. Based on a matrix coding query of all themes, the theme overlaps the university control over the academic speech (14 times), outside influence and restrictions on academic speech (11 times),

chilling effect (10 times), and lawfare (10 times) themes. The academic freedom–right or privilege and overlapping themes were strong positive relationships, above r = 0.90. Table 11.13 provides the results of the matrix query and correlations. The analysis demonstrations how these themes relate to the academic freedom – intramural and extramural speech theme.

Table 11.13

Matrix Coding of the Themes That Overlap the Academic Freedom–Intramural and Extramural Speech Theme

Theme	Number of overlapping references	Pearson correlation coefficient
University control over the academic speech	14	0.95425
Outside influence and restrictions on academic freedom	11	0.92550
Chilling effect	10	0.96487
Speech as a public employee versus private citizen	10	0.93900

University control over the academic speech. The participants did not feel that their universities were controlling their intramural and extramural speech. At his institution, Jensen stated,

> there has been no pressure on the content of teaching. I felt none personally. There has been no comment from any supervisor and discussions about curriculum. Our department just went through a curriculum revision process and we talked very openly about what should or shouldn't be taught and how it should be done and there was a lot of support voice for continuing to teach attentive critical thinking curriculum as often as possible. So, from the level of faculty colleagues to the university administration I have felt no pressure on my academic freedom in the classroom to construct and execute my course.

In contrast, another participant stated

> the pressures on the faculty about academic freedom are subtle. The university generally does not crack down on faculty's free expression. But, they really don't know half of what faculty are doing. So it's a matter of being a little careful [because] here are tools of exclusion and oppression that can be used to inhibit the promotion of faculty.

Agreeing, another interviewee added that his institution has "a robust culture…of academic freedom and the recognition of faculty speech rights. But, if the issue arose, I'm sure that the university would freely move toward addressing any questions that fall within an institutional perspective." In general participants did not feel that their university was controlling or restricting their academic speech.

Outside influence and restrictions on academic freedom. The relationship of the academic freedom–intramural and extramural speech and outside influence and restrictions on academic freedom themes were discussed previously. The discussion is repeated for the reader's convenience.

The theme focused on the effect non-university entities have on faculty's intramural and extramural speech. These entities include public opinion, legislators who require transparency on materials used in the classroom, and conservative advocacy groups who monitor classroom speech. Jensen discussed his experiences with these entities and responded to their efforts to restrict his speech.

On September 12, 2001, Jenson published an essay in the Houston Chronicle, *Stop the Insanity Here* in which he critiqued the possibility of a military response to the 9/11 attacks. As a result, he was chastised by the University of Texas at Austin's

President Larry Faulkner. It was the first time that he could remember that a university president "condemned him by name for his extramural political writing which does by nature of his position [as a Journalism faculty member] impact academic freedom." In turn, he questioned the "appropriateness of the chief officer of the university to make comments in response to a public outcry that publicly humiliated or attempted to publicly humiliated and ridicule a faculty member" for his speech. While many of his colleagues supported his right to extramural speech, many remained quiet.

Jensen's thoughts on the Texas legislation requiring faculty to publish their syllabi and vitae online and conservative advocacy groups provided insight into the faculty's role as a public employee and professional. He stated,

> when the state law kicked in stating that we all have to put our syllabi and COV's online, I was quite frankly shocked that faculty found this disturbing. I teach in the public university and if I'm not willing to put my syllabus in public I should quit and go home. I thought that outcry about putting syllabi online was really absurd. Number one I don't think there was a principle that could be defended there and number two it made faculty look like a whiny self-indulgent crybabies. If you can't defend your syllabus, you don't have any business teaching. I thought that was totally over blown.

On the issue of conservative advocacy groups monitoring his classes, he added,

> If students want to come in and sit in my course even though they're not enrolled that's fine with me. If the "conservative students to bust radical professors" or whatever the group might be called wanted to station a permanent monitor in my classroom, I would invite. Why not? Again, if I can't defend my teaching on intellectual grounds then I have no business being in the classroom. I continued to teach critical material and I teach it in ways that I think are pedagogically sound.

In Mississippi, another participant cautioned that, "we've got a fairly tightly structured constitutional board that is sensitive to a range of issues, including the ability of the faculty to speak freely." Both, faculty members are tenured professors.

Chilling effect. The relationship of academic freedom–intramural and extramural speech and chilling effect themes were discussed previously. The discussion is repeated for the reader's convenience.

The chilling of intramural and extramural speech was discussed by four of the participants. The reasons stemmed from faculty fear of being unemployed or singled out for their activities. From a political standpoint, Jensen contended,

> I don't think that it has anything to do with political fallout of 9/11, questions about war and peace, or public speaking about controversial issues. I think the reason that there's been a change is because of economic realities. There is an oversupply of faculty in almost every field. That oversupply is most dramatic in the traditional humanities and liberal arts, English, history, philosophy. An oversupply of labor and a contracting economic base for higher education. That equals to fear and fear equals conformity. So, people are probably less willing to step out either in public or internal to the university and ask critical questions either about public policy or about the internal working of the university, not because of traditional repression or you know political suppression of people's speech but because people are just afraid that during lean times, nobody's safe. That includes not just untenured or contingent faculty but everybody and it percolates up to tenured and full professors.

As a result, participants have curtailed their activities to reduce their exposure. One participant stated, that "the climate really changed," "faculty were worried," and "the pressures of the faculty about academic freedom are subtle." Adding,

> I have become more careful in my classes to make sure that I am including open perspectives and making formal changes to my methods of getting students involved so they hear a different voice, not just one. Many of us have become more careful and flexible in the classroom. I don't think that's necessarily horrible, but it is kind of a chilling climate thing.

To stay under the radar, Smith stated that he thought "there was an awareness that all our emails can be subpoenaed at any moment [which has resulted in] a greater degree of caution than what you would ideally like in an atmosphere of full academic freedom."

Speech as a public employee versus private citizen. Five participants contributed to the discussion of the content and context in which faculty speech is made. The balance between speaking as a public employee versus private citizen since *Garcetti,* was summarized by Nelson who stated,

> what the court's decision basically did was remove any First Amendment protection for shared governance speech at a public institution, with one qualification. If shared governance speech was normal, routine, expected, and part of your job description, you weren't protected. If, however, the administration, your statutes or your faculty handbook take a position that government matters are the not the job for the faculty but rather the job of the administration, faculty members could comment on it but because they have no recognized expertise or responsibility for doing so, their comments are fundamentally irrelevant and they still have First Amendment protection rights.

Kapus provided his thoughts on how he handles his public and private roles.

> In the classroom, I try to be as balanced as possible. I am sure that students can tell which side of an issue I support. Obviously, there are things I don't bring up because I don't think they're worth talking about.
>
> In the public, I feel that it's a different setting. It's not an educational setting. I feel more freedom to present what I think is the correct view on something. But, I wouldn't feel inhibited in any way. If it's something about a specific policy that the university has, I think you have to help the university be an effective organization so that what you say doesn't undermine the university's ability [to operate efficiently].

One participant provided his opinion on this role dichotomy stating, that, as a faculty member, "it's very difficult to separate out one's role as a citizen and one's role as an employee at a university because our work is about work." Given the court's decisions, Nelson warned, "the only thing that will protect you from consequences within the institution for speech exercised externally is academic freedom."

Interview Findings

The 19 participants in the study were representative of the population of full-time tenured professors. The majority of the participants were White males from the baby boom generation. As the sample selection process began by reviewing university governance websites for faculty to interview, the majority of the participants were active in their intuition's governance structure and committees and have published on the topic of academic freedom. Also, of the 19 participants, 10 were professors in the colleges of liberal arts and humanities, three in schools of law school, three in the colleges of education, two in colleges of communications, and one in the college of business. To report the interview analysis findings, the study answers each of the four research questions to discuss the study's findings.

Effect of federal, state, and local events on academic freedom. The theme, outside influences affecting academic freedom, focused on the external events effecting academic freedom at public universities since 2000. In the interviews, participants referenced events such September 11th, the rise of conservative advocacy groups on campuses, the Supreme Court's decision in *Garcetti* and other cases, the use of laws to wage war (lawfare) on academic freedom, media coverage by television and newspapers, economic and legislative decisions reducing university budgets, and the influence of corporate research funding. All of these events have negatively influenced academic speech especially for non-tenured faculty. Participants reported that these events have caused both tenured and non-tenured faculty to censor their speech as public employees and to maintain a low profile at their institutions.

Participants discussed the relationship between specific events that have affected academic speech. In one example, participants discussed lawfare against academic freedom as a result of court and decisions and legislation. Downs stated that "there is no question that different sources are using the courts to restrict certain policy decisions on the war on terror…and that there is no question about how [these decisions] are being used against academic freedom." In a second example there was the link between 9/11, legislative actions, conservativism, and court decisions. According to Doumani, after 9/11, "the passage of the Patriot Act, the very conservative Supreme Court, and the much more right wing political culture in this country" had direct implications on faculty ability to speak openly on campuses. Two participants discussed the direct relationship between 9/11, a statewide newspaper, and the University of Texas at Austin administration's repudiation of an editorial written by Robert Jensen. While the university recognized Jensen's academic freedom, neither participant could remember a time when the president of a university "condemning a faculty member in public." Jensen commented that, "if there were a 9/11 scale attack [today] and I started writing and organizing, my guess is that there's a higher likelihood that I would be disciplined by the university up to an including being terminated." These examples show the domino effect that outside events can have on universities and faculty's academic speech.

Offsetting these negative influences are organizations such as the American Association of University Professors (AAUP), American Civil Liberties Union (ACLU), and Foundation for Individual Rights in Education (FIRE). Sixteen participants

discussed these organizations in the context of using them when institutional policies were being developed, academic speech was challenged, or tenured faculty were being terminated. Of the 16 faculty interviewed, four indicated that the AAUP, or FIRE had responded to actions against tenured faculty on their campuses. To reduce tensions in the post-*Garcetti* period, Nelson stated that the AAUP recommended that "faculty senates or other appropriate bodies push to have language guaranteeing shared governance without the possibility of retaliation built in to faculty handbooks or, where appropriate, into collective bargaining agreements." He noted that about 20 universities had implemented this recommendation. Of the participant's institutions, six had active AAUP chapters and 13 did not (American Association of University Professors, 2011/2012).

Effect these events have on the way universities and faculty handle intramural speech. The academic freedom–intramural and extramural speech theme focused on the external events affecting academic speech at public universities. As was stated earlier, participants recognized that the academic landscape had changed but did not attribute the change to any single event. Two participants said that, due to outside influences resulting from news coverage and legislative pressures, they had changed the topics that they teach to "remain under the radar." The remainder felt their speech had not been constrained or restricted by their intuitions.

Tenure was an important factor empowering faculty speech. Participants recognized that the hiring of non-tenured faculty increased university control over the academic speech and resulted in faculty censoring the topics that they teach and select for research and publication. One person provided an example of a faculty member who

did not actively participate in the university's governance system until receiving tenure. The chilling effect caused by the practice of hiring part-time as oppose to full-time tenure track faculty provides public universities with a workforce that can be hired and fired at will, allowing administrators to control the topics discussed. Participants recognized this practice as an issue that will reduce the number of tenured faculty in the long term.

All but one participant, a professor at the University of Wisconsin, reported that their governance structures were advisory in nature and made recommendations to their institution's senior administration for consideration. To address *Garcetti*, these faculty governance structures have worked with administrators to develop or modify institutional policies. At the University of Wisconsin, Downs stated the faculty senate "directly dealt with *Garcetti*." They "proposed an amendment to their policy specifically provid[ing] protection for faculty members [who] question, criticize or comment on university policies, practices and procedures" and the senate and administration approved it. Another participant indicated that their university was just beginning to address the university's right to control public employees' speech. Not having strong shared governance was accepted by the participants as the norm. While participants claimed that their universities followed a majority of the faculty senate's recommendations, only one reported that their faculty senate worked actively with the administration to address events affecting academic freedom. That institution utilized an outside legal service that worked with their faculty union when issues related to

academic speech occurred. Others relied on organizations such as the AAUP, ACLU, and FIRE for counsel when academic speech is challenged.

Effect these events have on the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee. The speech as a private citizen versus public employee theme addressed this research question. The Supreme Court's decision in *Garcetti* was identified as a major event affecting faculty extramural speech. While participants stated that the circuit courts still had not defined whether *Garcetti* applies to academic speech, all participants agreed that the control that universities have over the academic speech has increased since 2000 and that faculty are cautious when they exercise their right to speak. Nelson stated, "the only guarantee that the campus will hold a faculty member harmless for extramural speech, speech off the campus, is the notion that academic freedom is a right that is held by faculty members." Jensen argued that the faculty's commitment to the core values of teaching and learning were strong but tended toward stagnation. He reasoned,

> the university is populated by people up to an including the president who do share those values yet constantly are adopting themselves to the institutional realities which are shaped now only by values internal to the institution but those external that increasingly have to do with funding [from the state, donors, and corporations].

As such, Doumani adds, "university administrators have adopted a non-confrontational stance with these outside groups and elected often not to defend or to passively defend their faculty." These external funding sources are important to the operations and

prestige of large research universities. Seventeen participants were tenured faculty at large research universities.

As decisions in *Grutter* and *Garcetti* raised control over the academic freedom to the institutional level, extramural speech such as research and publications, which are part of a faculty member's official duties may not be protected. While all the participants were tenured, they said that the faculty most vulnerable to discipline for their extramural speech are the part-time and non-tenured faculty. As all faculty interviewed were tenured, none indicated that they had curtailed their extramural speech.

Effect these events have on faculty's ability to defend their academic freedom. Since 2000, the main defense of faculty to attacks on their academic freedom has been tenure. All participants claimed that tenure allowed them to publish, do research, and teach on the topics of their choice. The majority identified external events that were chilling academic speech, mainly for non-tenured faculty with one participant stating that he had modified his in-class topics in order to deal with external pressures on his university. The remainder continued to teach their topics without interference or adverse action by the university.

All interviewees commented that their shared governance committees and structures are advisory and provide recommendations to their administrations, which can be vetoed. Jensen commented that the University of Texas faculty committees "have no power and that when [faculty] serve on them we provide the illusion of faculty governance to the administration [and justify their] concern for faculty input." While a majority of the participants stated that their recommendations were approved by their

administrations, they recognized that the university's ability to control academic speech has increased due to court decisions, economic vulnerabilities, the rise of conservativism, and the political and legislative pressures placed on university regents and administration to eliminate controversial speech by faculty. Contributing to the surge in control is the increase in part-time faculty and the decrease in number of tenured and tenured faculty at universities nationwide.

Summary

Of the 16 themes identified during the coding, 11 were discussed, six as prevalent themes and five as themes that were highly correlated to the prevalent themes. These themes included lawfare, First Amendment, speech as a public employee versus private citizen, institutional academic freedom, and faculty activism on campus. Of all the themes discussed, four were the same or similar to the ones defined in the case analysis.

In all, the participants observed that universities control academic freedom and, therefore, control academic speech on campus. Many participants referenced the *Garcetti* decision and the influence that outside entities such as alumni, donors, corporations, and legislators have over funding and the selection of university regents and presidents as factors enhancing their control. While participants felt that universities do not actively restrict academic speech, they acknowledged that faculty were cautious of the topics taught and recognized that, since 2000, academic speech was being progressively chilled. To counter these effects, all participants reported that they had active faculty governance structures in place. These structures acted in advisory roles

and provided decision in the form of recommendations to the upper levels on their institutions in all areas except the curriculum which faculty controlled. As such, participants reported that they understood the academic landscape in which they work and that, while they remained cautious, they had not changed the topics taught in the classes.

Chapter Twelve

This chapter presents a summary of the study and major conclusions drawn from the data and findings presented in chapters four through 11. Included is a discussion of the implications of the study and the recommendation for further research.

Summary of Study

Since 2000, academic freedom faces the most serious challenges and setbacks since the McCarthy era (Doumani, 2006). The hasty passage of the USA Patriot Act in 2001 and the subsequent efforts of well-funded and politically-connected advocacy groups have threatened the faculty's academic right to free and open inquiry and research; to design curriculum and teach freely within their university or college disciplines; and to unfettered extramural utterance and action as citizens (AAUP, 2006). As the AAUP's *1915 Declaration of Principles on Academic Freedom and Academic Tenure* infers, faculty in the social, political, and economic disciplines are the ones most likely to speak and express diverse opinions that have resulted in punitive actions by individuals and organizations internal and external to the university (AAUP, 2006). Their speech resulted in faculty in these disciplines being labeled as radical, unpatriotic, or subversive and legislators, courts, governing boards, alumni, students, and the media pressuring them to censor their behaviors or face the possibility of legal prosecution and dismissal. The emergence and development of the principles governing academic freedom resulted from long processes of interaction and discussion between the people who have power and people who pursue knowledge (Doumani, 2006). These dialogues

provided the foundation for the current freedoms that faculty have to do research, teach, and publish without fear of reprisal.

As occurred in previous eras, academic freedom since 2000 faces an uncertain future. Pressures from the same groups (conservative advocacy groups, legislators, courts, governing boards, alumni, students, and the media) are challenging academic speech and attempting to silence faculty. Since September 11, 2001 attacks on the World Trade Center, these activities have increased. Cole asserted that increased "attacks on professors…in the name of national security suggest that [academia] is headed toward another era of intolerance and repression" (2005, p. 5). Affirming these comments, Somers added, that "academic freedom of expression for faculty, staff, and students has become a casualty in the post-9/11 world" (n.d., p. 1) and concluded that "the mass psychology of wartime capitalizes upon citizens' fear to allow for restricted freedoms" (p. 7). These comments suggest the need for continued research to understand the influences affecting faculty intramural and extramural speech rights.

Purpose statement. The purpose of this study was to examine the status of academic freedom and, more specifically, intramural and extramural speech at public universities in the U.S. in the post-2000 moment. Court opinions from benchmark First Amendment court cases decided since 2000 and interviews of public university faculty members were analyzed to determine the current academic freedom issues and trends that have evolved. The findings could be used to inform university and faculty governance structures and leaders when academic freedom policies and practices are being developed.

Research questions. The area of study is "Faculty Intramural and Extramural Speech" at public universities since 2000. This study answered the following research questions:

1. How have federal, state, and local events affected academic freedom since 2000?
2. How have these events changed the way universities and faculty handle intramural speech?
3. How have these events changed the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee?
4. How have these events affected the faculty's ability to defend their academic freedom since 2000?

Methodology. The mixed methods study is primarily qualitative. The mixed methods design was selected because it provided the researcher with the ability to approach a problem in a more holistic manner and to utilize results from one method to inform the results of another (Onwuegbuzie & Leech, 2004) both at the micro and macro levels of the study. As Onwuegbuzie and Leech inferred, conducting a mixed methods study "involves collecting, analyzing, and interpreting qualitative and quantitative data in a single study or in a series of studies that investigate the same underlying phenomenon" (2006, p. 474).

The sources of data included both qualitative (pre-selected free speech court opinions and briefs and interviews of public university faculty) and quantitative (surveys of the faculty interviewed) data. The first stage of the research was the review and

qualitative analysis of six Supreme Court, appellate court, and district court cases and corresponding amicus briefs pertinent to intramural and extramural faculty speech. The analysis uses quantitative analysis and data to validate, order, and structure the presentation of the prevalent themes throughout the study. The cases included *Churchill* (2010) for extramural speech, *Schrier* (2006), *Garcetti* (2006), *Hong* (2007), and *Adams* (2010) for faculty speech as employees, and *Grutter* (2003) for institutional academic freedom. Full transcripts of all court opinions and amicus briefs from professional academic organizations, were retrieved, dated, and filed in order to increase the descriptive validity of the data. The opinions and briefs were deconstructed and coded in a qualitative analysis software (NVivo) for further review, reduction, clustering, counting, patterning, matching, and theme identification. The coding and theme identification allowed the prevalent changes in the court's reasoning and changing attitude toward academic speech rights to be identified. The analysis highlighted the themes, patterns, and issues and provided the basis for the second part of the qualitative phase, the faculty interviews.

The second stage of the qualitative analysis included 19 one-on-one interviews with faculty members from U.S. public universities. To achieve the goal, the process began by selecting a stratified sample of 23 professors from their university governance websites who had participated in their institution's governance structure, published in the area of academic speech rights, or both. Selected faculty members were emailed a description of the study and the consent form and asked if they were willing to be interviewed (see Appendices D, E, and F for the email invitation, description of the

study, and consent form). Faculty who did not respond were sent one follow-up email. If no response was received, they were dropped from the sample. The stratified sample identified eight faculty members who agreed to be interviewed with eight declining, and seven not responding to the invitation.

As some faculty declined to be interviewed, a "snowball" method of sampling was then implemented. "Snowball" sampling was selected because it provided an open-ended socio-metric method that allowed the researcher to build the sample of interviewees and expand the list based on extended associations (Kadushin, 1968) and on the context and criteria specific to the study. In this methodology, the participants in the stratified sample who were interviewed and also those who declined were asked to provide recommendations of faculty at public universities who might be willing to participate in the study. This process yielded 26 additional potential participants of which 11 agreed to be interviewed, 11 did not return the request, and four declined.

Faculty who agreed to participate scheduled one hour for the interview. The interview format consisted of a general background statement to introduce the past and current issues facing academic freedom and to focus the participant on the topic of the study. The interviews were conducted in person (1) or by phone (18). During the interview, the researcher asked five open-ended questions which included the following.

- How have federal, state, and local events affected academic freedom at your institution since 2000?
- Is academic freedom a right or a privilege at your institution? What criteria does your institution use to evaluate faculty academic freedom when their

speech as a public employee and private citizen converge and become an issue?

- In what ways do the faculty governance structures at your institution respond when challenges to faculty intramural and extramural speech occur?
- What effect does institutional academic freedom have on the faculty's role in the governance structure at your university?
- How have faculty at your institution altered their intramural and extramural speech since 2000?

The open-ended format of the questions allowed the researcher to probe and ask follow-up questions with the intent of identifying prevalent themes and arguments. The interviews were digital audio recorded, transcribed by a bonded service, and coded in a qualitative analysis software (NVivo) to identify dominant themes and patterns.

The quantitative analysis part of the study included surveys of the faculty interviewed. The survey included seven multiple choice questions and collected demographic information such as region of country, age group, ethnicity, gender, assignment type, whether the participant has participated in shared governance at their institution, and whether the faculty member has published on the topic of academic freedom. The survey assisted in defining the characteristics of the sample so it can be replicated at other universities if further research is needed.

Data analysis. The qualitative analysis of archival information utilized a content analysis approach. Krippendorff (2004) defined content analysis as "a research technique for making replicable and valid inferences from texts to the contexts of their

use" (p.18) and, therefore, inferred that every "content analysis must have a context within which texts are examined" (p. 24). Limiting the context allowed the research to remain focused on the phenomenon studied and reduced the diversity of the interpretations. Defining the context as academic intramural and extramural free speech since 2000 focused the data collection and analysis.

Court opinions and amicus briefs. Full transcripts of the court case opinions and amicus briefs from professional academic organizations, were retrieved, dated, and filed in order to increase the descriptive validity of the data collection phase. First-level descriptive and interpretive codes (Miles & Huberman, 1994) were used to code, reduce, and categorize the data for analysis. As codes became obsolete, they were removed or combined with other codes. As codes emerged, they were added or a second-level coding schema developed in order to allow for further data reduction and analysis. The data were entered into a qualitative data package (NVivo10) for further review, reduction, clustering, counting, patterning, matching, and theme identification. The themes identified in the court opinions and amicus briefs provided the external or outside view of the issues and events effecting academic freedom at public universities in the U.S. Themes crossing more them one case were used as predetermined themes for the faculty interview coding and analysis.

Interviews and surveys. The faculty interviews provided information on the changing landscape of academic freedom on U.S. university campuses. The interview questions and process were piloted with a public university faculty member to validate the flow and clarity of the questions, to determine the amount of time required for each

interview, to resolve technical issues, and to deal with any researcher bias. Feedback from the pilot was used to modify and improve the process for the one-on-one interviews.

The 19 interviews were digitally recorded and archived to provide descriptive validity to the study. After each interview, the recording was sent to a bonded transcription services, transcribed into Microsoft Word, and returned to the researcher. The transcripts were emailed and reviewed by each participant who reviewed, corrected, and returned it to the researcher in 30 days. Throughout the interviews, the researcher took field notes and incorporated them into the transcripts. After participant review and correction, the transcripts were loaded into a qualitative statistical package for content analysis and coding. The theme analysis of the interviews provided the internal or inside university view of the issues and events effecting academic freedom at public universities in the U.S.

The research then proceeded to the quantitative phase of the study in which a survey was used to collect demographic data in order to identify the characteristics of the sample. The survey collected demographic data such as region of country broken down by Supreme Court district, appointment track and type, generational age group, gender, ethnicity, whether they had participated in faculty governance at their institution since 2000, whether they had published on academic freedom, and a space for additional comments. Participants had seven days from the date of the interview to respond.

Research validation methods. Research findings utilized four validation methods in order to test data quality. The methods were pattern checking, replication,

phenomenological validity, and triangulation (Miles & Huberman, 1994). The collection of data from archival documents, one-on-one interviews, and surveys allowed multiple independent sources to be used in order to complement the findings. The mixed methods allowed both qualitative and quantitative analysis to be used to corroborate and determine conflicts in the results.

To further test data quality, the effect that the researcher has on the interview process was checked prior to the start and during the interview stage. First, the pilot interview determined not only the validity of the questions but also provided feedback on the researcher's communication style and the effect of the researcher on the study (Miles & Huberman, 1994). Feedback from the pilot was recorded for verification during the interviews and incorporated in the actual interviews. Second, the faculty interviews included an environmental scan of the location, documented any interruptions during the interview, and recorded any reactions to questions, or changes in the setting during the interview. At the start of each interview, the interviewees were provided a list of questions to be asked in order to keep the interview focused. All interviews were digital-audio recorded, transcribed in full so that all points of view were included, and coded for patterns and themes. After each interview, the researcher documented any changes that might have affected the data interpretation.

After all interviews were completed, the researcher provided the full transcript of the interview to each person interviewed so that they could validate the outcomes and provide clarifications if needed. This "phenomenological validity" test further identified any research bias that the researcher had on the interview as well as the interview on the

researcher (Miles & Huberman, 1994). The data analysis included a write-up of any observations, responses, changes, and effects realized during the interviews.

Outliers in the data were tested to determine the strength of the study's findings. Validating the theme references coded during the case and interview analysis identified exceptions caused by data smoothing. Reviewing these exceptions protected the study from self-bias and allowed the researcher to build a thorough explanation of the results (Miles & Huberman, 1994).

Finally, findings were replicated from multiple independent data sources throughout the study. First, the information from case analysis was pulled from cases that had been decided in the federal, district, or state courts. The logic used by the various courts included a review of the amicus briefs in order to provide a cross case analysis of the rulings. Second, the interviews included faculty from different regions of the U.S., universities, academic departments, and types of appointment to provide diversity in the opinions and patterns identified. Third, the surveys of the faculty interviewed provided a basis for determining if the sample was representative of the study population. The replication methods outlined compliment the triangulation method discussed. By using data from multiple sources as well as multiple analysis methods, the researcher eliminated what Miles and Huberman (1994) call "holistic fallacy" or the mistake of basing findings and results on biased information because outliers were ignored. The validity testing affords the data a level of reliability for future studies.

The analysis used the data extracted and coded from each phase to identify dominant patterns and themes. Using the strategy of deconstruction, the study presented the findings of the research.

Major Findings

The events affecting academic freedom in the neo-McCarthy era (2000 to present) are similar to those in previous eras. During the pre-McCarthy (1890 to 1939) and McCarthy (1940 to 1959) eras, the U.S. had fought two world wars (WWI and WWII) and one major conflict (Korean War). The nation's fear of communist infiltrators throughout these periods allowed the government to focus on restricting the First Amendment speech rights of citizens declared subversive and un-American. Faculty members who taught or published on topics that discussed or supported communism were vulnerable to investigation by their institutions or by the government and discipline. The reaction of faculty was to self-censor themselves for fear of retaliation. These events and reactions are similar to the events that have occurred since 2000.

The 6 cases and 19 interviews provided an external and internal analysis of the challenges facing academic freedom since 2000. To report the joint findings, the study addressed the four research questions to discuss the study's major findings.

Research Question 1: Effect of federal, state, and local events on academic freedom. The major events affecting academic freedom started with the September 11, 2001 attacks on the World Trade Center and continued with the Iraq and Afghanistan Wars. The conservative Supreme Court, the rise of conservative advocacy groups on campuses, the use of the legal system to wage war (lawfare) on academic freedom, the

media's coverage on television and newspapers focused on condemning un-American speech, the threat by lawmakers to reduce university budgets for controversy resulting from faculty speech, and the increased dependence and influence of corporate research funding were identified as contributing factors to the current, post 9/11 legal and academic environment. All faculty who were interviewed reported that these events and factors had caused both tenured and non-tenured faculty to censor their speech as public employees and to maintain a low profile at their institutions. As occurred in the pre-McCarthy and McCarthy eras, major military interventions resulted in an increase in patriotism, which has reduced the ability of legislators and citizens to tolerate speech that is critical of the government or American values. The reaction of the courts has been to legitimize the university's ability to control employee speech and to reduce the avenues faculty have to defend their academic freedom and right to free speech.

As court cases are also events, the six cases that were studied provided a legal barometer for how the decisions made by the federal, state, and local courts are affecting academic speech. *Grutter* provided a baseline for the university's right to control its academic decisions and environment. While *Grutter* focused on law school admissions standards, the Supreme Court's ruling in favor of the university recognized the right of the university to institutional academic freedom. In subsequent cases such as *Garcetii, Schrier*, and *Hong*, institutional academic freedom was reinforced by the court's decision to uphold the right of the public employer to control employee speech. This right was buttressed by the court's reluctance to interfere with academic decisions and their determination that faculty at public universities are public employees. For

universities, these actions have strengthened their control over the academic environment and weakened the ability of the faculty to speak freely on issues outside of the classroom.

In May 2006, *Garcetti* provided the definitions for what speech public employers have the right to control. The Supreme Court's decision in *Garcetti* modified the *Pickering* test by adding an initial step to determine whether an employee was speaking pursuant to his official job duties. The new test, called the *Garcetti/Pickering* analysis, focused on the role from which the public employee was speaking in order to determine whether the employee's speech was protected or not. In the *Hong* and *Adams* cases, faculty served in college leadership or on shared governance committees. Based on the *Garcetti/Pickering* analysis, their speech made in these roles categorized as public employees and was, therefore, unprotected. The analysis presents a quandary for faculty speech especially when they are required to participate in the decision-making and operations of the university. While the *Garcetti* court left the district courts to work out the details of their decision, the effect that it will have on academic freedom remains different in each of the circuits studied and dependent on whether universities are supportive of unfettered faculty speech regardless of their role.

The *Churchill* case provided an example of how the September 11, 2001 attack and a tenured faculty's academic speech resulted in an investigation by the university. Soon after the attacks, Ward Churchill published an essay, *On the Justice of Roosting Chickens,* concerning the attacks and condemning U.S. foreign policy. The essay resulted in legislators and university regents calling for his termination. While the

university found his essay and speech to be protected by the First Amendment, they opened an investigation into other articles that Churchill published during his tenure at the University of Colorado. The investigation found evidence of research misconduct and he was terminated from his tenured position at the university. The case provided an example of how controversial extramural speech on a national event can trigger actions from people outside the university that remove a faculty member and silence his academic speech. While Churchill contended that the court's actions would chill speech on campus, no conclusive evidence was provided to prove that assertion.

Faculty who were interviewed discussed how these events and cases were interrelated. In one example, participants discussed how court decisions and legislation are used to wage war against academic freedom. Downs commented that "there is no question that different sources are using the courts to restrict certain policy decisions on the war on terror…and that there is no question about how [these decisions] are being used against academic freedom." After 9/11, Doumani stated, that "the passage of the Patriot Act, the very conservative Supreme Court, and the much more right wing political culture in this country" have had direct implications on the faculty's ability to speak openly on campuses. To this, two participants added the direct relationship between 9/11, a statewide newspaper, and the University of Texas at Austin administration's repudiation of an editorial written by Robert Jensen. While the university recognized Jensen's academic freedom, neither participant could remember a time when the president of a university "condemning a faculty member in public." Jensen commented that, "if there were a 9/11 scale attack [today] and I started writing

and organizing, my guess is that there's a higher likelihood that I would be disciplined by the university up to and including being terminated." These examples show the domino effect national, state, and local events can have on faculty's academic speech.

Offsetting these negative influences are organizations such as the American Association of University Professors (AAUP), American Civil Liberties Union (ACLU), Thomas Jefferson Center for the Protection of Free Expression, and Foundation for Individual Rights in Education (FIRE). Sixteen participants discussed these organizations in the context of using them when institutional policies were being developed, academic speech was challenged, or tenured faculty were terminated. Of the 16 faculty interviewed, four indicated that the AAUP, or FIRE had responded to actions against tenured faculty on their campuses. To reduce tensions in the post-*Garcetti* period, Nelson stated that the AAUP recommended that "faculty senates or other appropriate bodies push to have language guaranteeing shared governance without the possibility of retaliation built in to faculty handbooks or, where appropriate, into collective bargaining agreements." He noted that about 20 universities had implemented this recommendation. In the cases studied, the AAUP, ACLU, and Thomas Jefferson Center for the Protection of Free Expression filed amicus briefs but none of the requests made were granted and all cases were decided in favor of the institution. As was the case in the pre-McCarthy, McCarthy, and post-McCarthy eras, these external organizations worked diligently to defend academic freedom with varied success.

Research Question 2: Effect these events have on the way universities and faculty handle intramural speech. A number of events have contributed to universities

having more control over faculty intramural speech. The actions and comments of the Supreme Court in *Grutter* and *Garcetti* show their continuing reluctance to be involved in academic decisions that are best left to the university. Faculty who were interviewed found that these decisions as well as the ineffectiveness of faculty governance structures, the increased hiring of part-time and non-tenure track faculty, and the monitoring of faculty speech by conservative advocacy groups are all factors in the erosion of academic speech in the classroom and faculty participation in business of the university.

As stated earlier, the *Grutter* and *Garcetti* decisions gave universities the right to control public employee speech and increased their right to control academic speech. Two cases, *Hong* and *Adams*, provided insight into how courts applied the *Garcetti* standard to determine whether their intramural speech was made pursuant to their official duties as public employees and not protected by the First Amendment. In *Hong*, the district court found that his intramural speech as a department chair was a matter of public concern but ruled that it was not protected because it was part of his official job duties. The district and appellate court ruled in favor of the university. In *Adams*, the district court found that the materials submitted in his tenure and promotion package were not protected because they were part of his official job duties. It ruled in favor of the university but, on appeal, the appellate court found that the district court had ignored the Supreme Court's reservation of applying *Garcetti* to academic speech and, therefore, had misapplied the *Garcetti* analysis. *Adams* was remanded in 2011 for further analysis but the case was settled out of court in mediation. These conflicting outcomes in two

different circuits epitomize the issues facing faculty as public employees when the content of intramural speech becomes an issue with their university.

The question of whether *Garcetti* applies to academic speech remains dependent on the role faculty hold when they speak. Intramural speech in the classroom was not challenged in the cases. Non-classroom intramural speech, which the university decided was interfering with university operations, was an issue in the *Schrier* and *Hong* cases and the university reacted by exerting their right to control the speech. In these cases, both faculty members were removed from their leadership roles due to their adversarial speech against their college's decisions. While they retained their faculty positions due to tenure, the university successfully defended their actions in court and their right to control intramural speech.

Interviewees recognized that the academic landscape had changed but did not attribute the change to any single event. Two indicated that due to outside influences resulting from news coverage and legislative pressures, they had changed their lecture topics in order to remain "under the radar." Tenure was an important factor in faculty not feeling that their speech was constrained or restricted by their intuitions. As such, they recognized that the hiring of non-tenured faculty increased the university's ability to control academic speech and was a factor in faculty self-censoring themselves. One participant provided an example of a faculty member who did not actively participate in the university's governance system until receiving tenure. The chilling effect caused by the practice of hiring part-time as opposed to full-time tenure track faculty provides public universities with a workforce that can be hired and fired at will, allowing

administrators to control the topics discussed. Participants recognized this practice as an issue that will reduce the number of tenured faculty in the long term.

All but one participant, a professor at the University of Wisconsin, reported that their governance structures were advisory in nature and made recommendations to their institution's senior administration for consideration. To address *Garcetti*, these faculty governance structures have worked with administrators to develop or modify institutional policies. At the University of Wisconsin, Downs stated the faculty senate "directly dealt with *Garcetti*." They "proposed an amendment to their policy specifically provid[ing] protection for faculty members [who] question, criticize or comment on university policies, practices and procedures" and the senate and administration approved it. Another participant indicated that their university was just beginning to address the university's right to control public employees' speech. Not having strong shared governance was accepted by the participants as the norm. While participants claimed that their universities followed a majority of the faculty senate's recommendations, only one reported that their faculty senate worked actively with the administration to address events affecting academic freedom. That institution utilized an outside legal service that worked with their faculty union when issues related to academic speech occurred. Others relied on organizations such as the AAUP, ACLU, and FIRE for counsel when academic speech was challenged. As challenges to intramural speech arise, these organizations continue to be called upon to provide guidance and address faculty speech issues.

Research question 3: Effect these events have on the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee. Beginning in 2004, the courts debated the difference between speech made by a public employee and a private citizen at an increasing rate until the *Garcetti* (2006) decision. The Supreme Court's decision in *Garcetti* was a pivotal point for determining whether the public employee speech was protected by the First Amendment, and what authority the public employer had to control the speech. The court's discussion from 2004 to 2008 was dominated by three interrelated themes, speech as a public employee versus private citizen, expression pursuant to official job duties, and an employer's right to control speech. Once the *Garcetti* court decided that public employers had the right to control employee speech that was part of their job duties, the theme, speech as a public employee versus private citizen, was not referenced in subsequent cases. Instead, the courts focused on determining whether the context and content of the employee's speech was made as part of their job duties and whether the institution had a right to control the employee's speech. While the Supreme Court left the district courts with the task of deciding how their decision applies to universities, the focus of the court's opinions clearly turned to discussions of whether the intramural and extramural speech of faculty can be considered part of their job duties and within the university's right to control.

The Supreme Court's decision in *Garcetti* was also identified as a major event by the faculty interviewed. While participants stated that the circuit courts still had not defined whether *Garcetti* applies to academic speech, all faculty members agreed that

the control that universities have over academic speech has increased since 2000 and that faculty are cautious when they exercise the right to speak. Nelson stated, that "the only guarantee that the campus will hold a faculty member harmless for extramural speech, speech off the campus, is the notion that academic freedom is a right that is held by faculty members." Jensen argued that the faculty's commitment to the core values of teaching and learning were strong but tended toward stagnation. He reasoned that

> the university is populated by people up to an including the president who do share those values yet constantly are adopting themselves to the institutional realities which are shaped now only by values internal to the institution but those external that increasingly have to do with funding [from the state, donors, and corporations].

As such, Doumani adds, "university administrators have adopted a non-confrontational stance with these outside groups and elected often not to defend or to passively defend their faculty." These external funding sources are important to the operations and prestige of large research universities. Seventeen of the 19 participants were tenured faculty at large research universities.

As decisions in *Grutter* and *Garcetti* elevated the control of academic speech to the institutional level, extramural speech such as research and publications which are an essential part of a tenured faculty member's official duties are eligible for review and regulation by the university. Contributing to the institution's desire to oversee these duties was the reduction in state and federal funding at public institutions and the increased reliance on corporate funding for research since 2000. Extramural speech that was controversial or conflicted with the corporate ideologies of administrators and could have negative results on the university's operations were especially susceptible to being

censored and silenced. The faculty who were interviewed recognized that part-time and tenure track faculty are the most vulnerable to this type of action. After being tenured, one interviewee observed that a colleague was more active and vocal in the institution's governance structure.

Research question 4: Effect these events have on faculty's ability to defend their academic freedom. The ability for universities to claim immunity for their regents and senior administrators was an important part of their legal defense. In the cases researched, universities were granted immunity by the lower courts, a decision that was upheld in all the higher courts. Therefore, immunity was a valuable tool in reducing the university's exposure to a lawsuit.

As such, a university's immunity can adversely affect academic freedom as it blocks faculty's ability to defend their First Amendment violation claims in court. Shortly after the September 11 attacks on the World Trade Center in New York, Ward Churchill published his essay, *On the Justice of Roosting Chickens,* concerning the attacks and U.S. foreign policy. The essay's content was controversial. Legislators and university regents called for his termination. While the university found that the essay and his speech were protected by the First Amendment, they opened an investigation into the other articles that he had published during his tenure at the University of Colorado. The investigation found evidence of plagiarism and he was terminated from the university. During the trial, the jury found that the university would not have investigated his publication had he not published the essay and awarded him a nominal amount of $1. In turn, the Colorado district, appellate, and Supreme Courts ruled that the

university and its regents were immune from lawsuit and dismissed all of Churchill's claims. The *Churchill* case exemplified how public institutions and universities can use immunity to dismiss claims against them and maintain control of academic speech without having to defend themselves against violations of protected speech.

Faculty who were interviewed identified tenure as their main defense to attacks and restrictions on academic freedom. All participants indicated that tenure allowed them to publish, do research, and teach on the topics of their choice. The majority (15) stated that external events were chilling academic speech, mainly for non-tenured faculty. Contributing to this effect is the increase in part-time faculty and the decrease in number of tenured and tenured faculty employed at universities nationwide. Even so, only one participant stated that he had modified his in-class topics to address external pressures on the university. The remainder continued to teach topics of their choice without interference or restrictions by the university.

All interviewees commented that their shared governance committees and structures are advisory and provide recommendations to their administrations, which the administration can then veto. Jensen commented that the University of Texas faculty committees "have no power and that when [faculty] serve on them we provide the illusion of faculty governance to the administration [and justify their] concern for faculty input." While a majority of the participants stated that their recommendations were approved by their administrations, they recognized that the university's ability to control academic speech has increased due to recent court decisions, the economic downturn, the rise of conservativism, and the political and legislative pressures being placed on

university regents and senior administration to restrict speech by faculty that is controversial or unpopular. These findings are similar to the ones affecting academic speech in the pre-McCarthy and McCarthy eras when post-depression conservative lawmakers disciplined faculty for speech found to be subversive and un-American. As occurred then, briefs submitted by the AAUP and ACLU in the six cases researched were not successful in changing the outcomes of the court's decisions.

Conclusions

The Supreme Court's reservation in *Garcetti* has left academic speech in the hands of the district courts to decide whether *Garcetti* applies to faculty when they speak as public employees in their roles as deans, department chairs, or committee members. In *Schrier*, which was decided seven months after *Garcetti*, the 10th Circuit ruled in favor of the University of Colorado's right to control Schrier's speech. The court found that his speech was detrimental to the efficient operations of the institution and, even though it was found to be a matter of public concern, was not protected. In the 4th Circuit, the court used the *Garcetti* analysis and found that Hong's speech as a department chair was made pursuant to his job duties and not protected under the First Amendment. In the 9th Circuit, the court also used the *Garcetti* analysis and found that the materials submitted by Adams in his application for promotion and tenure constituted speech made pursuant to his official duties and were also not protected. While the appellate court in *Adams* found that the lower court misapplied *Garcetti* and remanded the case for further review, no conclusive decision was eventually made because the case was mediated and settled out of court. While the Supreme Court had

reservations as to whether *Garcetti* applied to academic speech, the circuit court's rulings in favor of the university in the cases studied shows that faculty intramural and extramural speech made outside of the classroom, in leadership and governance roles, or used to move faculty to tenure are not protected by the First Amendment.

The court's recognition of the university's right to control academic speech when it hinders their efficient operations changed academic freedom from being a right recognized as a special concern of the First Amendment to a privilege granted by the university to the faculty associated with them. Four factors contribute to this conclusion. First, in each of the cases researched, the courts reiterated their reluctance to be involved in decisions that would place them in the position of providing constant oversight or second guessing university practices. In doing so, the courts gave universities the authority to control their administrative and academic environments without court interference. Second, the briefs written by the AAUP, ACLU, FIRE, and The Thomas Jefferson Center for Free Expression in the cases researched have not been successful in reversing the court's decisions in favor of the public employee. Third, while the majority of the faculty who were interviewed (15) indicated that academic freedom was a right, all were tenured and recognized that speech was being chilled on their campuses. The same interviewees also indicated that the chilling effect was a result of some outside influence such as lawmakers, corporations, donors, alumni, or elected officials that directed the university to control on-campus speech or face repercussions. Fourth, the use of non-tenured and contingent faculty at public universities is increasing. As Nelson commented,

> in 1975 about one-third of faculty members were contingent or not eligible for tenure. By 2005, the percentage switched to two-thirds not eligible for tenure or off the tenure track. Now, it's a little bit over 70% and it looks like it's going to just keep increasing by some tiny increment each year.

Based on these four factors, public universities have complete control over academic freedom and it is a privilege granted to faculty based on their scholarly association with the university.

At the conclusion of each interview, participants were asked if academic freedom was alive and well at their institution. Their responses covered the spectrum of answers from "not at all" to "yes, absolutely." The following are quotations from the interviews answering the question.

- Doumani: Not at all. And the basic reason for that is because the public culture of democracy, tolerance, and justice in this country is not alive and well. Only when there is a larger social movement that creates an environment for freedom, will academic freedom really thrive.

- Curry: I think that academic freedom from liberal arts professors is on life support. I really do. I think that there is a definite constraint, a definite choking the life out of any kind of a robust, strong notion of academic freedom here.

- Nelson: I think your academic freedom to report the research results that you want and publish as you choose is very well supported by the institution. I think that shared governance speech can be punished, never directly, and can have consequences. Over the last decade, the administration has become much less tolerant of speech critical of administration's actions and proposals. So now, I think that there are consequences for various shared governance speech that did not occur 40 years ago, or even a generation ago.

- Smith: I would say it's alive. It's under some challenge but it's doing pretty well.

- Melear: Well, K. B. Melear would tell you yes. Again, you are talking to one person here, but I am delighted to work at an institution like this one where your voice is considered to be an integral part of what we do as a function of the institution to educate our students, conduct our research, and use that

> research to inform our teaching. So, I would tell you yes, academic freedom here is absolutely in sound shape.

These quotations reflect that academic freedom continues to be an unresolved issue at public universities. Decisions by the Supreme Court in *Grutter* and *Garcetti* and the district courts in *Schrier*, *Hong*, *Churchill*, and *Adams* contribute to the discourse of whether academic freedom will survive. If the number of tenured faculty decrease and non-tenured, part-time faculty increases, the probability that academic speech will be chilled and the academic freedom of faculty will decrease is highly probable.

Significance

As in previous eras, academic freedom in the post-2000 moment faces an uncertain future as pressures attempt to curtail free speech and silence faculty. Giroux (2006) attributed these activities to rightwing forces that have highjacked political power and are undermining the principles of academic freedom in the name of patriotic correctness. Cole added that increased "attacks on professors…in the name of national security suggest that [academia] is headed toward another era of intolerance and repression" (2005, p. 5). Affirming these comments, Somers stated, that "academic freedom of expression for faculty, staff, and students has become a casualty in the post-9/11 world" (n.d., p. 1) and concluded that "the mass psychology of wartime capitalizes upon citizens' fear to allow for restricted freedoms" (p. 7). Together, these comments suggest the need for continued research to understand the influences affecting academic freedom. As Nelson (2009) stated,

> Academic freedom must be regularly redefined in the context of the cultural and political debates currently shaping higher education's public identity. Like it or not, academic freedom is not simply an unchanging platonic ideal. It is reshaped in response to contemporary political struggles and changing legal, economic, and technological realties. (pp. 1-2)

This study provided a detailed analysis of the national debate that is occurring between the federal, state, and local courts and free speech advocacy organizations. Faculty interviews added to understanding how these debates were affecting the academic landscape on campuses. Public university administrators, general counsels, deans, department chairs, and faculty would benefit from this study as it provided an intensive analysis of post-2000 First Amendment court cases and the perceptions that faculty have concerning their intramural and extramural speech rights. Overall, the study added to existing research on faculty speech rights and the effect legislation and court decisions are having on academic freedom at public universities.

Recommendations for Research

The study analyzed six cases and the researcher interviewed 19 faculty at public universities throughout the U.S. One recommendation is to research and analyze additional First Amendment cases that have been decided since 2000. Dr. Robert O'Neil discussed *Urofsky* (2000), *Gorham* (2009), and *Demers* (2012) as important cases that could be analyzed. Others that are in the courts could also be considered for inclusion.

Another recommendation is to consider using a different sample. The research focused on public universities in the U.S. Instead, future research could focus on private universities or community colleges throughout the U.S., regions of the country (Northwest, Southwest, Southeast, Northeast, New England), specific states (Texas,

Florida) or specific Supreme Court districts. Selecting one or a combination of these criteria as a sample could improve the significance of the research to specific institutions or regions of the country.

A different sample to consider for future research would be changing the type of faculty selected for the interviews. The research included only tenured faculty but all interviewees mentioned the vulnerability of part-time and non-tenured faculty. Sampling from one or more of the following would provide a different perspective to the research: part-time and adjunct faculty, academic deans, department chairs, faculty from specific colleges within one or more institutions. A researcher might also consider interviewing administrators such as provosts, vice chancellors or vice presidents from public universities in order to study academic speech from their perspective. This approach would provide comparison and perhaps alternative voices.

Finally, the researcher attempted to interview a diverse sample of faculty from each Supreme Court district. The majority of interviewees were white, male, tenured, full professors from the baby-boomer generation. While the sample selection process included faculty from of each ethnicity, gender and age group, there was one African American, one Asian/Pacific Islander, no Native American/Alaskan Native, and no Hispanic faculty interviewed. Also, faculty from Supreme Court districts 2 (CT, NY), 8 (ND, SD, NE, MN, IA, MO, AR), or 10 (WY, UT, CO, NM, KS, OK) did not consent to be interviewed. Future research should consider the demographics and districts not included in this study.

Concluding Remarks

Control over academic speech has come full circle in the last 122 years. In the pre-McCarthy and McCarthy eras, faculty speech was controlled by the university and the government punished scholars for their exercise of free speech. Communism was the ideology most feared by the nation and the one that occupied the government's energy. Academic speech was chilled on campuses as faculty and administrators were brought before tribunals and fired from universities for their affiliations with various organizations, their publications, and their speech. Throughout these eras, the AAUP (founded in 1919) and ACLU (founded in 1920) defended faculty and individual rights and liberties.

The post-McCarthy era began with a surge in the recognition of individual civil rights. Academic speech was contentious as faculty and universities debated which would have the ultimate control. While the era saw the Vietnam War, the fall of the Berlin Wall, and the end of the red scare, it ended with the rise in conservativism and the start of the Iraq War. Fear of another ideology, terrorism, gripped the nation as the new Millennium began.

In 2000, the neo-McCarthy era began. The era is exemplified by the September 11, 2001 attacks on the Twin Towers in New York, the escalation of the Iraq War, the increase in airport, and online security and surveillance, the fall and rise of foreign students attending universities, faculty being investigated and disciplined for their research and publications, and the start of the Afghanistan War. These events and the recent court decisions on First Amendment cases have caused academic speech to be

chilled. While the interviewees stated that academic freedom is a right, the majority recognized that the university controls faculty speech at their institutions. While only one stated that he had modified his speech, the remainder selected the topics for their classes without interference from the university or outside sources.

Public universities and their faculty have entered a precarious time. The need for an honest and open dialogue between senior administrators and faculty concerning academic freedom must occur in order to preserve the integrity and diversity of the nation's largest asset, our education system. As stated in the beginning of the research, everyone will remember where they were on September 11, 2001 when the first plane hit the north tower of the World Trade Center at 8:46 a.m. (Smith, 2003) but, unfortunately, few will reexamine the impact that the ensuing events have had on Constitutional rights and the academic freedom of faculty for the decade to come. In response to this statement, this research attempts to provide a thorough examination and analysis of the legal and academic landscape that universities and their faculty have faced since 2000 concerning intramural and extramural academic speech. For now, academic freedom is alive and well, but only, for tenured faculty at public universities. Non-tenured faculty continue to censor their speech in fear of being fired or not having their contracts renewed. If actions are not taken to safeguard these freedoms and protect faculty speech, these rights and privileges will dwindle to the point where, as Nelson states, "the last faculty member on earth probably won't have a helluva lot of academic freedom."

Appendix A: AAUP Censured Institutions

Institution	Committee Report	Censured Imposed	Censure Removed
University of Mississippi	1930	1931	1933
Mississippi Agricultural and Mechanical College	1930	1931	1933
Mississippi State College for Women	1930	1931	1933
Battle Creek College (MI)		1933	1933
Harris Teachers College (MO)		1933	1936
Rollins College (Fla.)	1933	1934	1938
DePauw University (IN)	1934	1935	1937
U.S. Naval Academy (MD)	1934	1935	1938
University of Pittsburgh	1935	1936	1947
North Dakota Agricultural College	1938	1939	1940
Montana State University	1940	1940	1945
Saint Louis University	1939	1940	1947
John B. Stetson University (FL)	1939	1940	1949
University of Tennessee	1939	1940	1947
West Chester State Teachers College (PA)	1939	1940	1959
Central Washington College of Education	1940	1941	1948
Adelphi College (NY)	1941	1942	1952
University of Kansas City	1941	1942	1957
Western Washington College of Education	1941	1942	1944
Brenau College (Ga.)	1934	1943	
Winthrop College (SC)	1942	1943	1957
Memphis State College	1943	1944	1949
State Teachers College (TN)	1942	1944	1956
University of Missouri	1945	1946	1952
University of Texas	1946	1946	1953
Evansville College IN)	1949	1950	1956
University of California, Berkeley	1956	1956	1958
Jefferson Medical College (PA)	1956	1956	1968
North Dakota Agricultural College	1956	1956	1964
Ohio State University	1956	1956	1959
University of Oklahoma	1956	1956	1957
Rutgers University (NJ)	1956	1956	1958
Saint Louis University	1956	1956	1957
Temple University (PA)	1956	1956	1961
Catawba College (N.C.)	1957	1957	1964
University of Nevada	1956	1957	1959
Alabama Polytechnic Institute	1958	1958	1964
Dickinson College (PA)	1958	1958	1963

Institution	Committee Report	Censured Imposed	Censure Removed
Livingstone College (NC)	1958	1958	1960
University of Michigan	1958	1958	1960
Southwestern Louisiana Institute	1956	1958	1960
Texas Technological College	1958	1958	1967
Fisk University (TN)	1959	1959	1966
New York University	1958	1959	1961
Lowell Technological Institute (MA)	1959	1960	1971
Princeton Theological Seminary (NJ)	1959	1960	1961
Allen University (SC)	1960	1961	1962
Benedict College (SC)	1960	1961	1969
Alabama State University	1961	1962	1982
South Dakota State University	1961	1962	1991
Alcorn Agricultural and Mechanical College (MS)	1962	1963	1973
State College of Arkansas	1963	1963	1968
Grove City College (PA)	1963	1963	
University of Illinois	1963	1963	1967
Sam Houston State College (TX)	1963	1963	1970
Arkansas Agricultural, Mechanical, and Normal College	1964	1964	1965
Mercy College of Detroit	1963	1964	1968
College of the Ozarks (AR)	1963	1964	1997
University of South Florida	1964	1964	1968
University of Arizona	1963	1965	1966
Lincoln College (IL.)	1964	1965	1968
Wayne State College (NE)	1964	1965	1990
St. John's University (NY)	1966	1966	1971
Amarillo College (TX)	1967	1968	2004
Arkansas Agricultural & Mechanical College	1967	1968	1970
Cheyney State College (PA)	1967	1968	1972
Lorain County Community College (OH)	1968	1968	1970
St. Mary's College (MN)	1968	1968	1969
Southern University and Agricultural and Mechanical College (LA)	1968	1968	1987
Texas A&M University	1967	1968	1982
Trenton State College (NJ)	1968	1968	1969
Wisconsin State University, Whitewater	1968	1968	1975
Broward Junior College (FL)	1969	1969	1974
Central State College (OK)	1969	1969	1995
Detroit Institute of Technology	1969	1969	1981
Dutchess Community College (NY)	1969	1969	1972
Frank Phillips College (TX)	1968	1969	

Institution	Committee Report	Censured Imposed	Censure Removed
Northern State College(SD)	1968	1969	1982
Sonoma State University (CA)	1983	1969	1992
Troy State University (AL)	1968	1969	1986
Indiana Institute of Technology	1970	1970	1974
Indiana State University	1970	1970	1975
University of Mississippi	1970	1970	1975
Oklahoma State University	1970	1970	1979
Southeastern Louisiana College	1969	1970	1982
University of Florida	1970	1971	1975
Grambling College (LA)	1971	1971	1981
Laredo Junior College (TX)	1970	1971	1986
Southern State College (AR)	1971	1971	1994
Tennessee Wesleyan University	1971	1971	1987
Armstrong State College (GA)	1972	1972	1983
University of California, Los Angeles	1971	1972	1980
Columbia College (MO)	1971	1972	1973
Onondaga Community College (NY)	1971	1972	1991
Colorado School of Mines	1973	1973	1992
Cornell University (NY)	1973	1973	1975
East Tennessee State University	1973	1973	1978
Marshall University (WV)	1972	1973	1980
McKendree College (IL)	1973	1973	1987
Ohio State University	1972	1973	1980
Queensborough Community College (NY)	1973	1973	1978
Rider College (N.J.)	1973	1973	1993
Southern Illinois University at Carbondale	1973	1973	1977
West Chester State Teachers College (PA)	1972	1973	1975
Bloomfield College (N.J.)	1974	1974	1978
Camden County College (NJ)	1973	1974	1995
Voorhees College (SC)	1974	1974	1986
Concordia Seminary (MO)	1975	1975	
Elmira College (NY)	1975	1975	1977
Houston Baptist University	1975	1975	2004
University of Science and Arts of Oklahoma	1975	1975	1976
Virginia Community College System	1975	1975	2003
Arizona State University	1976	1976	1983
Blinn College (TX)	1976	1976	2001
Marquette University (Wis.)	1976	1976	1997
Murray State University (KY)	1975	1976	
St. Mary's College (CA)	1976	1976	1979

Institution	Committee Report	Censured Imposed	Censure Removed
City University of New York	1977	1977	1983
College of Osteopathic Medicine and Surgery (IA)	1977	1977	2006
University of Texas Health Science Center at Houston	1976	1977	1981
Wilkes College (PA)	1977	1977	1989
University of Detroit	1978	1978	1994
Phillips County Community College (AR)	1978	1978	
State University of New York	1977	1978	
University of Maryland	1979	1979	1989
University of Texas of the Permian Basin	1979	1979	1996
Wingate College (NC)	1979	1979	2005
Nichols College (MA)	1980	1980	
Olivet College (MI)	1980	1980	2004
Philander Smith College (AR)	1980	1980	1981
Bridgewater State College (MA)	1981	1981	1994
Harris–Stowe College (MO)	1981	1981	1985
Eastern Oregon State College	1982	1982	1989
Yeshiva University (NY)	1981	1982	
American International College (MA)	1983	1983	
Auburn University (AL)	1983	1983	1993
Goucher College (MD)	1983	1983	1987
University of Idaho	1982	1983	1989
Morehead State University (KY)	1983	1983	1987
Illinois College of Optometry	1982	1984	2000
Metropolitan Community College's (MO)	1984	1984	
University of Northern CO	1984	1984	1992
Oklahoma College of Osteopathic Medicine and Surgery	1985	1985	1989
Southwestern Adventist College (TX)	1985	1985	2003
Temple University (PA)	1985	1985	1992
Westminster College of Salt Lake City	1984	1985	2006
Clark College (Ga.)	1985	1986	1987
Talladega College (AL)	1986	1986	
Catholic University of Puerto Rico	1987	1987	
Husson College (ME)	1987	1987	
Morgan State University (MD)	1987	1987	1992
Southern Nazarene University (OK)	1986	1987	2005
Claflin College (SC)	1988	1988	1990
Hillsdale College (MI)	1988	1988	
University of Judaism (CA)	1988	1988	1999
Maryland Institute College of Art	1988	1988	2006
Alabama State University	1989	1989	1999

Institution	Committee Report	Censured Imposed	Censure Removed
Concordia Theological Seminary (IN)	1989	1989	1999
Southeastern Baptist	1989	1989	
Alvernia College (PA)	1990	1990	1991
Catholic University of America (D.C.)	1989	1990	
New York University	1990	1990	2003
Saint Leo College (FL)	1989	1990	1999
Baltimore City Community College	1992	1992	
Chowan College (N.C.)	1992	1992	1996
Dean Junior College (MA)	1991	1992	
Loma Linda University (CA)	1992	1992	
Wesley College (DE)	1992	1992	1999
Clarkson College (NE)	1993	1993	
North Greenville College (SC)	1993	1993	
Savannah College of Art and Design	1993	1993	
Benedict College (SC)	1994	1994	
University of Bridgeport (CT)	1993	1994	
Alaska Pacific University	1995	1995	
Bennington College	1995	1995	
Essex Community College (MD)	1995	1995	2006
Nyack College (NY)	1994	1995	2006
Stevens Institute of Technology	1995	1995	1999
National Park Community College (AR)	1996	1996	
St. Bonaventure University (NY)	1995	1996	
University of Southern California	1995	1996	1999
Minneapolis College of Art and Design	1997	1997	
Saint Meinrad School of Theology (IN)	1996	1997	
Brigham Young University (UT)	1997	1998	
University of the District of Columbia	1998	1998	
Lawrence Technological University (MI)	1998	1998	
Johnson and Wales University (RI)	1999	1999	
Mount Marty College (SD)	1999	1999	2004
Albertus Magnus College (CT)	1999	2000	
University of Central Arkansas	2000	2000	2003
Charleston Southern University	2001	2001	
University of Dubuque (IA)	2001	2002	
Tiffin University (OH)	2002	2002	2007
Meharry Medical College	2004	2005	
University of the Cumberlands	2005	2005	
Virginia State University	2005	2005	
Our Lady of Holy Cross College	2007	2007	

Institution	Committee Report	Censured Imposed	Censure Removed
Bastyr University	2007	2007	
University of New Orleans	2007	2007	2011
Loyola University New Orleans	2007	2007	2011
Cedarville University	2009	2009	
Nicholls State University	2008	2009	
North Idaho College	2009	2009	
Stillman College	2009	2009	
Clark Atlanta University	2010	2010	
University of Texas Medical Branch at Galveston	2010	2010	
Bethune Cookman University	2010	2011	
Louisiana State University, Baton Rouge	2011	2012	
Northwestern State University of Louisiana	2012	2012	
Southeastern Louisiana University	2012	2012	

(AAUP, January 2003; AAUP, January 2011; AAUP, 2013)

Appendix B: Email to Participants

Dear <<Name>>,

My name is Bill Carter. I am a doctoral candidate in the Higher Education Administration program at the University of Texas at Austin.

My dissertation topic is "Academic Freedom - The Silencing of the Faculty?"

The purpose of the study is to examine the status of academic freedom and, more specifically, intramural and extramural speech at universities in the U.S. since 2000. The logic and court opinions from benchmark court cases and the faculty's perspective of current academic freedom issues will be analyzed to determine dominant trends and themes that have evolved since 2000. The findings could be used to inform university and faculty governance structures and leaders when academic freedom policies and practices are being developed.

Part of my research is interviewing 21 tenured faculty at public universities on academic freedom. I am reaching out to ask you to participate in my research. The interview will require an hour of your time, be audio recorded and respect your confidentiality.

If you have any question, I can be reached at 713-718-5570 (Work: 9am-5pm CMT), 512-997-8356 (Cell: anytime) or at william.carter@hccs.edu. If you get my voice mail, please leave a number and I will call you back as soon as possible.

This study has been reviewed and approved by The University of Texas at Austin Institutional Review Board. If you have questions about your rights as a study participant, or are dissatisfied at any time with any aspect of this study, you may contact-anonymously, if you wish-the Institutional Review Board by phone at (512) 471-8871 or email orsc@uts.cc.utexas.edu.

IRB Approval Number: 2011-08-0066

IRB APPROVED: 10/25/2011

EXPIRES: 10/24/2012

I have attached a consent form for your review and look forward to your positive response.

Sincerely,

William E. Carter

Appendix C: Research Proposal

I. **Title:** Academic Freedom - The Silencing of the Faculty?

II. **Investigators (co-investigators):** Mr. William E. Carter
Chair of Dissertation Committee: Dr. Patricia Somers

III. **Hypothesis, Research Questions, or Goals of the Project:**

The purpose of the proposed study is to examine the status of academic freedom and, more specifically, intramural and extramural speech at universities in the U.S. since 2000. The logic and court opinions from benchmark court cases and the faculty's perspective of current academic freedom issues will be analyzed to determine dominant trends and themes that have evolved since 2000. The findings could be used to inform university and faculty governance structures and leaders when academic freedom policies and practices are being developed

Research Questions

The area of study is "Faculty Intramural and Extramural Speech" at public universities since 2000. This study centers on the following research questions:

1. How have federal, state, and local events affected academic freedom since 2000?

2. How have these events changed the way universities and faculty handle intramural speech?

3. How have these events changed the way universities and the faculty handle extramural speech when speaking both as a citizen and a public university employee?

4. How have these events affected the faculty's ability to defend their academic freedom since 2000?

IV. **Background and Significance**:

Currently, academic freedom faces the most serious challenges and setbacks since the McCarthy era (Doumani, 2006). The hasty passage of the USA Patriot Act in 2001 and the subsequent efforts of well-funded and politically-connected advocacy groups have threatened the faculty's academic right to free and open inquiry and research; to design curriculum and teach freely within their university or college disciplines; and to unfettered extramural utterance and action as citizens (AAUP, 2006). As the *1915 Declaration* infers, faculty in the social, political, and economic disciplines are the ones most likely to speak and express diverse opinions that have resulted in punitive actions by individuals and organizations internal and external to the university (AAUP, 2006). These actions have resulted in faculty in these

disciplines being labeled as radical, unpatriotic, or subversive and their actions have been countered by legislators, courts, governing boards, alumni, students, and the media, who all impelled faculty to censor their behaviors or face the possibility of legal prosecution and dismissal.

Academic freedom's emergence and development were the result of long processes of interaction between people who have power and people who pursue knowledge (Doumani, 2006). As in previous eras, academic freedom in the post-9/11 moment faces an uncertain future as pressures attempt to curtail free speech and silence faculty. Cole adds in stating that increased "attacks on professors…in the name of national security suggest that [academia] is headed toward another era of intolerance and repression" (2005, p. 5). Affirming these comments, Somers states that "academic freedom of expression for faculty, staff, and students has become a casualty in the post-9/11 world" (n.d., p. 1) and concludes that "the mass psychology of wartime capitalizes upon citizens' fear to allow for restricted freedoms" (p. 7). These comments suggest the need for continued research to understand the influences affecting faculty intramural and extramural speech rights.

Public university administrators, general counsels, deans, department chairs, and faculty benefit from the study as it provides an intensive analysis of post-2000 court case logic and faculty perceptions of their intramural and extramural speech rights and adds to existing research concerning faculty speech rights.

V. Research Method, Design, and Proposed Qualitative Analysis:

Research design:

The proposed qualitative study focuses on the changing academic landscape since 2000. The qualitative research includes (1) the review of six to eight Supreme, appellate, and district court cases pertinent to intramural and extramural faculty speech and (2) interviews of fifteen to twenty-one faculty at universities throughout the U.S. The interview sample will be stratified and preselected based on faculty who are and are not faculty senate officers and have and have not published on academic freedom.

The first phase of the qualitative study is the non-random selection and retrieval of six to eight court cases decided by the U.S. Supreme, appellate, or district courts from 2000 to present that are specific to intramural and extramural academic free speech. The court cases are in the public domain and include but are not limited to *Yacouvelli* (2004) for classroom discussions, *Al Arian* (2008) and *Churchill* (2010) for extramural speech, *Schrier* (2005), *Garcetti* (2006), *Hong* (2007), *Satar* (2009), and *Adams* (2010) for faculty speech as employees, and *Grutter* (2003) and *Gratz* (2003) for institutional academic freedom. The cases will be analyzed to identify the logic of the courts' decisions and used to highlight the patterns and issues to be discussed in the faculty interviews.

The second phase of the qualitative study is one-on-one interviews of fifteen to twenty-one university faculty. Themes derived from the analysis of post-2000 court

cases will be used to introduce open-ended questions in order to focus the interviewee's response on the academic environment since 2000. The open-ended format of the faculty interviews allows the researcher to probe and ask follow-up questions with the intent of identifying prevalent themes and arguments. The interviewee's reactions and the environmental issues are to be noted in order to identify uncontrolled interferences and interviewer bias (Miles & Huberman, 1994).

At the end of the interview, each participant will be asked to complete a short survey to collect region of country, participant in faculty governance since 2000 (Y/N), ethnicity, gender, published on academic freedom (Y/N), and generational age group. All data will be discussed and collected anonymously and transcribed and analyzed to protect the interviewee's identity.

Data collection and analysis:

The qualitative analysis of archival information utilizes a content analysis approach. Krippendorff (2004) defines content analysis as "a research technique for making replicable and valid inferences from texts to the contexts of their use" (p. 18) and, therefore, infers that every "content analysis must have a context within which texts are examined" (p. 24). Limiting the context allows the research to remain focused on the phenomenon studied and to reduce the diversity of the interpretations.

Full transcripts of the court cases, law review articles, and briefs from professional academic organizations, will be retrieved, dated, and filed in order to increase the descriptive validity of the data collection phase. First-level descriptive and interpretive codes (Miles & Huberman, 1994) such as case jurisdiction (federal, district), type (faculty speech as employee, research, classroom discussion, due process), decision (plaintiff, defendant, appealed), consequence (termination, hire, rehire, tenure, loss of tenure) and case logic (adverse employment, chilling effect, first amendment, governance, immunity, political influence, retaliation, time and cost, whistle blower) are used to code, reduce, and categorize the data for analysis. As codes become obsolete, they will be removed or combined with other codes. As codes emerge, they will be added or a second-level coding schema will be developed in order to allow for further data reduction and analysis. The data will be entered into NVivo, a qualitative data package, for further review, reduction, clustering, counting, patterning, matching, and theme identification.

The faculty interviews provide information on the changing landscape of academic freedom on U.S. university campuses since 2000. The interview questions and process are to be piloted with a public university faculty member to validate the flow and clarity of the questions, to determine the amount of time required for each interview, to resolve technical issues, and to deal with any researcher bias. Feedback from the pilot is to be used to modify and improve the process for the one-on-one interviews and reported in the data analysis.

The fifteen to twenty-one faculty interviews will be digitally audio recorded and archived for future reference. The archive provides descriptive validity as the actual one-on-one interviews become a permanent unchanged record of the study. The recordings are to be transcribed and upload to MS Word for final review, correction, and storage. Field notes taken at the time of the interviews will be incorporated into the transcript review and correction process and loaded into NVivo for content analysis and coding. Themes and codes derived from the logic of the court case and interview analysis provide focus to the study on the macro-level issues of public university academic freedom in the U.S.

Research findings utilize four validation methods to test data quality; 1) pattern checking, 2) replication, 3) phenomenological validity, and 4) triangulation (Miles & Huberman, 1994) (see Figure 2). The collection of data from archival documents and interviews allows the multiple independent sources to be used to complement their findings.

To further test data quality, the effect that the researcher has on the interview process is to be checked prior to the start and during the interview stage. First, the pilot interview determines not only the validity of the questions but also provides feedback on the researcher's communication style and the effect of the researcher on the study (Miles & Huberman, 1994). Feedback from the pilot will be recorded for verification during the interviews and incorporated in the actual interviews. Second, the faculty interviews include documentation of any interruptions, a record of reactions to the questions, and changes in the setting that occurred during the interview. Prior to the start of the interview, the interviewee is to be provided a consent form with a description of the study. Once consent has been attained, the interviewee will be provided a list of questions to be asked in order to keep the interview focused.

At the end of the interview, a short survey will be conducted to collect general data such as region of country, participant in faculty governance since 2000 (Y/N), ethnicity, gender, published on academic freedom (Y/N), and generational age group. All interviewees will be assigned a letter that will be used throughout the analysis. All interviews will be digitally recorded, transcribed in full so that all points of view are included and coded for patterns and themes. After each interview, the researcher will document any changes from the previous interview that might have affected the data interpretation.

After the interview is transcribed, the researcher will provide each participant with their interview transcript so they have an opportunity to validate the outcomes and provide clarifications if needed. This "phenomenological validity" test further identifies any research bias that the researcher had on the interview as well as the interview on the researcher (Miles & Huberman, 1994). The data analysis includes a write-up of any observations, responses, changes, and effects realized during the interviews.

Outliers in the data analysis are to be tested to determine the strength of the study's findings. Validating the patterns and themes identified in the qualitative phase with the survey data collected during the quantitative phase identifies exceptions due to data smoothing and provide a way to strengthen the findings by defining what a finding is not. Understanding outliers protects the study against self-bias and builds a better explanation of the results (Miles & Huberman, 1994).

Finally, findings are to be replicated from multiple independent data sources throughout the study. First, the information from case logic analysis will be pulled from cases that have been decided in the federal, district, or state courts. The logic used by the various courts includes a review of the briefs and law review articles in order to provide a cross case analysis of the rulings. Second, the interviews include faculty from different regions of the U.S., universities, academic departments, and type of appointment to provide diversity in the opinions and patterns identified. The replication methods outlined compliment the triangulation method discussed earlier. By using data from multiple sources, the researcher eliminates what Miles and Huberman (1994) call "holistic fallacy" or the mistake of basing findings and results on biased information because outliers were ignored. The validity testing affords the data a level of reliability for future studies.

VI. Human Subject Interactions

A. Sources of potential participants

Full transcripts of the selected court cases are available from the LexisNexis database and law libraries, if necessary. Briefs and law review articles related to cases are accessible online from law review journals, the AAUP, ACLU, FIRE, and the Thomas Jefferson Center for the Protection of Free Speech and provide discussions of the legal arguments and perspectives raised in the court cases.

Participants will be tenured faculty from public 4-year universities throughout the U.S. The stratified and preselected sample of 21 adult participants will consist of faculty who have and have not served on faculty governance committees and who have and have not published on academic freedom.

B. Procedure for the recruitment of the participants.

Upon approval by IRB, the investigator will contact via phone and email pre-selected university faculty who have and have not served on faculty governance committees and who have and have not published on academic freedom to explain the research study and request permission to interview them for 60 minutes regarding the study. The contact information will be obtained from university and academic association directories which are available on the Internet. The researcher will then contact each participant to attain consent and set a time for the interview. The interviews will be conducted in-person at a location outside of their institution and over the phone based on the participant's convenience.

C. Procedure for obtaining informed consent.

The researcher will provide each participant with the consent form which will be in English via email if the interview is conducted on the phone or in-person by the researcher if the interview is conducted one-on-one. Participants that re interviewed in-person will be required to sign the consent form before the interview begins. Participants that are interviewed on the phone will be contacted to answer any questions and required to verbal consent to the interview over the phone before the interview begins.

Participants will have full access to meet with the researcher via phone, email, or in-person to discuss any concerns and to respond to questions regarding the study. The researcher will sign and deliver signed consent forms to each participant prior to the interview. All consent forms will be stored in a locked file cabinet in the researcher's locked office.

D. Research Protocol.

Between October 2011 and December 2011, the researcher will schedule one-hour interviews with the participants which will be audio recorded. The interviews will be conducted on the phone or in-person based on the participants convenience. In-person interviews will be conducted at a public location away from the participant's institution. Field notes will record changes in the interview environment.

After the interview, the researcher will email an anonymous post-interview survey to the participant. The participant will have seven days from the date of the interview to respond.

After the interview has been transcribed, the transcript will be emailed to the participant for validation and comment. All corrections and comments will be recorded and included in the study.

E. Privacy and confidentiality of participants

The court cases, briefs, and reviews used in the first phase of the study are ready available online from LexusNexus and other public sources.

Participation in the second phase of the study, faculty interviews, is voluntary. Interviewees can skip any questions during the interviews and in the post-interview survey that they chose. The interviews and surveys will be labeled based on the letter (A through Z) assigned at the time of the interview. Participants are encouraged to answer questions to the best of their ability, but are not required to respond if they choose not to. Information provided in the interview or survey will be kept confidential and participants may terminate their participation at any time without penalty. To ensure the privacy of data, the researcher will not use the information provided in the interview and surveys for any purposes outside of this research project.

Participants will be advised to not disclose any of the interview and survey responses outside of the interview setting. Also, the researcher will not use pseudonyms and will not collect the participants' names, social security, address, phone numbers or anything else that could identify the participants in any reports of the study. The results of the findings will not contain any identifiers.

F. Confidentiality of the research data.

All consent forms will be stored in a locked file cabinet in the researcher's locked office.

All audio tapes used during the interviews will be labeled based on the letter (A through Z) assigned to the interview so the investigator can identify them during the analysis phase. The investigator will ensure the labeling does not provide personal information that can expose the participants. The researcher will only play the tapes for the purpose of transcription and research. The tapes will be stored in a locked cabinet in the researcher's locked office. The tapes will be destroyed at the end of the transcription process.

The post-interview surveys will be analyzed and stored in a locked cabinet in the investigators locked office to maintain the confidentiality of the data. The investigator will have sole possession of the locked cabinet and locked office. The researcher will retain the data indefinitely for future analysis before destroying the data.

G. Please describe your research resources.

Full transcripts of the selected court cases will be obtained from the LexisNexis database and law libraries, if necessary. Briefs and law review articles related to cases are accessible online from law review journals, the AAUP, ACLU, FIRE, and the Thomas Jefferson Center for the Protection of Free Speech and provide discussions of the legal arguments and perspectives raised in the court cases.

VII. Describe any **potential risks**.

There are no known potential risks associated with this study. The potential risks are anticipated to be no greater than faculty are exposed to every day.

VIII. Describe and assess the **potential benefits**.

There are a number of significant benefits associated with this study.

- New and reliable data will be available on the current court opinions and faculty perceptions of academic freedom and more specifically intramural and extramural speech at public 4-year universities in the U.S.

- The study will assist public universities in reviewing and developing institutional practices, policies and programs related to intramural and extramural speech.

- The study will provide informative data and information to faculty governance organizations on the current status of intramural and extramural speech in the courts and on the campuses throughout the U.S.

- The University of Texas researchers as well as other institutions will have access to new data and information that describes and analyzes the court opinions and faculty's perception of academic freedom since 2000.

- No direct benefits are anticipated for participants in the study.

IX. Indicate the specific **sites or agencies involved in the research project** besides The University of Texas at Austin.

The interviews will be held by phone, in person at the researcher's office, or in a public location chosen by the participant.

X. If the project has had or will receive **review by another IRB**, indicate this. Attach a copy of this approval to this application or submit it to the IRB secretary of the IRB when you receive it. The UT IRB will usually accept the versions of consent forms that have been approved by IRBs affiliated with hospitals or medical schools, or by the site where the research will be conducted.

The project is not under review by another Institutional Review Board.

Appendix D: Consent Form

Title: **Study of Academic Freedom – Intramural and Extramural Speech**

Date: **8/28/11**

IRB PROTOCOL #: **2011-08-0066**

Conducted by: William E. Carter

Institution: The University of Texas at Austin, Department of Educational Administration

Contact Info: C: 512-997-8356 or w: 713-718-5570, william.carter@hccs.edu.

You are being asked to participate in a dissertation study. This form provides you with information about the study. The person in charge of this research will also describe this study to you and answer all of your questions. Please read the information below and ask any questions you might have before deciding whether or not to take part. Your participation is entirely voluntary. You can refuse to participate without penalty or loss of benefits to which you are otherwise entitled. You can stop your participation at any time and your refusal will not impact current for future relationships with UT Austin or participating sites. To do so simply tell the researcher you wish to stop participation. The researcher will provide you with a copy of this consent for your records.

The purpose of this study is to research academic freedom's intramural and extramural speech privileges at universities since 2000.

If you agree to be in this study, we will ask you to do the following things:

- Do an audio recorded interview on your perception of academic freedom in the current moment.
- Complete a brief survey to collect broad demographic information.

Total estimated time to participate in study is 60 minutes

Risks of being in the study

- The risks involved in this study are minimal.
- You might disclose a violation of academic freedom at your institution or an opinion that is not consistent with your institutions policies. However, this information will only be revealed if required to do so in a court of law.
- The interview and survey ask for rather harmless information. There is a small risk of loss of confidentiality. Confidentially and privacy protections are described below.
- This research may involve risks that are currently unforeseeable. If you wish to discuss the information above or any other risks you may experience, you may ask questions now or call the Principal Investigator listed on the front page of this form.

Benefits of being in the study

- By talking about academic freedom, you may obtain an increased sense of personal power and ownership about your academic decisions and perceptions.
- For institutions, state and federal policy makers, and those who work in faculty and university governance structures, the results from this study could be used to provide insight into the current status of academic freedom at universities and shape future policies and practices concerning intramural and extramural speech.

Compensation:

- No compensation is provided for participation in this study.

Confidentiality and Privacy Protections:

- The data resulting from your participation will not be made available to other researchers.
- The data and analysis will contain no identifying information that could associate you with it, or with your participation in any study.

The audio and hard-copy records of this study will be stored securely and kept confidential. Authorized persons from The University of Texas at Austin, members of the Institutional Review Board have the legal right to review your research records and will protect the confidentiality of those records to the extent permitted by law. All publications will exclude any information that will make it possible to identify you as a subject. Throughout the study, the researchers will notify you of new information that may become available and that might affect your decision to remain in the study.

Contacts and Questions:

If you have any questions about the study please ask now. If you have questions later, want additional information, or wish to withdraw your participation call the researchers conducting the study. Their names, phone numbers, and e-mail addresses are at the top of this page. If you have questions about your rights as a research participant, complaints, concerns, or questions about the research please contact James Wilson, Ph.D., Chair, The University of Texas at Austin Institutional Review Board for the Protection of Human Subjects at (512) 471-6978 or the Office of Research Support and Compliance at (512) 471-8871 or email: orsc@uts.cc.utexas.edu.

You will be given a copy of this information to keep for your records.

Statement of Consent:

I have read the above information and have sufficient information to make a decision about participating in this study. I consent to participate in the study.

Signature: _____ Date: _____

_____ Date: _____

Signature of Person Obtaining Consent

Signature of Investigator: _____ Date: _____

Appendix E: Academic Freedom Interview Questionnaire

Please answer some questions about yourself and return to William.Carter@hccs.edu.

1. Region of Country in which participant is a faculty member – Select one choice:

- ☐ 1 = ME, NH, MA RI
- ☐ 2 = CT, NY
- ☐ 3 = DE, PA, NJ
- ☐ 4 = MD, DC, WV, VA, NC, SC
- ☐ 5 = MS, LA, TX
- ☐ 6 = MI, OH, KY, TN
- ☐ 7 = WI, IL, IN
- ☐ 8 = ND, SD, NE, MN, IA, MO, AR
- ☐ 9 = WA, OR, CA, NV, AZ, ID, MT
- ☐ 10 = WY, UT, CO, NM, KS, OK
- ☐ 11: None of the above

2. Appointment

a) Appointment Track – Select one choice:

- ☐ 1 = Tenured
- ☐ 2 = Tenure Track
- ☐ 3 = Non-tenure track

b) Appointment Type – Select one choice:

- ☐ 1 = Assistant professor
- ☐ 2 = Associate professor
- ☐ 3 = Full professor
- ☐ 4 = Other (lecturer, clinical, itinerant, etc.)

3. Generation/Age Group - Select one choice:

- ☐ 1 = Silent Generation born 1925-1946
- ☐ 2 = Baby Boom Generation born 1947 to 1960
- ☐ 3 = Generation X born 1961 to 1982
- ☐ 4 = Generation Y/Millennial born 1983 to 2000

4. Sex - Select one choice:

   ☐ 1 = male
   ☐ 2 = female

5. Race/ethnicity – Select all that apply:

   ☐ 1 = Caucasian
   ☐ 2 = Hispanic
   ☐ 3 = African American
   ☐ 4 = Asian/Pacific Islander
   ☐ 5 = Native American/Alaskan Native

6. Participated in faculty governance since 2000:

   ☐ 1 = Yes
   ☐ 2 = No
   If Yes, please provide role in faculty governance: _____

7. Published on subject of academic freedom:

   ☐ 1= Yes
   ☐ 2 = No

Additional Comments

THANK YOU FOR YOUR HELP

Academic Freedom Interview Protocol

Background

Prior to 2000, courts emphasized academic freedom as a special interest of the First Amendment based on the decisions made in two landmark cases. These cases continue to be reference when courts are faced with violations of faculty intramural and extramural speech and are provided below.

1. In *Sweezy*, the target of governmental inquiry that this Court found to be constitutionally impermissible was a series of lectures by a scholar at a state university. Both the opinion of the Court and Justice Frankfurter's seminal concurring opinion stressed the "vital role in a democracy that is played by those who guide and train our youth," concluding that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. . . ." (*Sweezy v. New Hampshire*, 1957).
2. The *Keyishian* Court, two decades later, expressed special concern for "laws that cast a pall of orthodoxy over the classroom," noting the "transcendent value of [academic freedom] to all of us and not merely to the teachers concerned" (*Keyishian v. Board of Education*, 1969).

Since 2000, two additional cases have expanded the institution's right to govern academic freedom and the ability of public employers to discipline employees for utterances that are deemed part of their job.

1. In 2002, the *Grutter* court recognized institutions academic freedom and right of the institution to make academic decisions (*Grutter v. Bollinger,* 2003).
2. In 2006, the *Garcetti* court ruled that "the First Amendment does not prohibit managerial discipline based on a public employee's expressions made pursuant to official job responsibilities"(*Ceballos v. Garcetti*, 2004, p. 7). The court also recognized that "expression related to academic scholarship or teaching implicates additional constitutional interests that are not accounted for in this Court's customary employee-speech jurisprudence" (p. 7).

Courts have held that public institutions have the right to regulate public employees speech when they speak on issues related to their job. This places faculty at public universities in a precarious position when they serve on governance committees that are internal and/or external to the institution as well as when they teach or publish on controversial topics.

Questions

1. How have federal, state, and local events affected academic freedom at your institution since 2000?
2. Is academic freedom a right or a privilege at your institution? What criteria does your institution use to evaluate faculty academic freedom when their speech as a public employee and private citizen converge and become an issue?
3. In what ways do the faculty governance structures at your institution respond when challenges to faculty intramural and extramural speech occur?
4. What effect does institutional academic freedom have on the faculty's role in the governance structure at your university?
5. How have faculty at your institution altered their intramural and extramural speech since 2000?

Appendix F: Participants Who Waived Confidentiality

Interview	Date Interviewed	Waived Confidentiality
Bob Jensen	1/31/2012	Y
Robert O'Neil	2/8/2012	Y
Joan Hemmingway	2/23/2012	Y
Jerry Kapus	2/24/2012	Y
Todd DeMitchell	3/6/2012	Y
Richard Fossey	3/12/2012	Y
Cary Nelson	3/14/2012	Y
John Blackburn	3/15/2012	Y
Neal Hutchins	3/26/2012	Y
Tommy Curry	3/26/2012	Y
Timothy Sheill	4/10/2012	Y
Michael J. Smith	5/8/2012	Y
Bashara Doumani	6/7/2012	Y
Donald Downs	6/12/2012	Y

Appendix G: Court Cases Cited

Adams v. Univ. of North Carolina, 640 F. 3d 550 (4th Cir. 2011), cert. denied, 131 S. Ct. 233 (2010).

Ceballos v. Garcetti, 2002 WL 34098285, No. CV-001-11-06-AHMAJWX, (C.D. Cal. Jan. 30, 2002), *reversed,* 361 F.3d 1168 (9th Cir. 2004), *reversed,* 547 U.S. 410 (2006).

Churchill v. Univ. of Colorado at Boulder, 293 P. 3d 16 (Colo. App. 2010), *affirmed on other grounds,* 285 P.3d 986 (Colo. 2012).

Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *reversed,* 309 F.3d 329 (6th Cir. 2001), *affirmed,* 539 U.S. 306 (2003).

Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *affirmed* 403 Fed. Appx. 236 (9th Cir. 2010).

Schrier v. Univ. of Colorado, 427 F.3d 1253 (10th Cir. 2005).

References

Adams v. Trustees of the University of North Carolina, No. 7:07-CV-64-H (E.D.N.C. Mar. 15, 2010).

Adams v. Univ. of North Carolina, 640 F. 3d 500 (4th Cir. 2011).

Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (1967).

Alien Registration Act, Pub. L. 76-670, 54 Stat. 670, 671. (1940).

Altman, H., Barry, J., Brook, D., Carbin, J., Gale, D., Patel, M. F., Shaffer, G.,Valenzuela, R., Warner, D., & Lewis, F. (2001, September 13-19). Nothing will ever be the same. *Philadelphia City Paper*. Retrieved from http://citypaper.net/browse/091301.shtml

American Association of Community Colleges. (n.d.). *CC growth over past 100 years.* Retrieved from http://www.aacc.nche.edu/AboutCC/history/Pages/ccgrowth.aspx

American Association of University Professors. (n.d.). *Special committees*. Retrieved from http://www.aaup.org/AAUP/comm/specialcomms.htm

American Association of University Professors. (1989). *75 years: A retrospective of the seventy-fifth annual meeting.* Retrieved from http://www.aaup.org/NR/rdonlyres/31BF8601-1107-4CD6-BF74-058E04454C5B/0/ARestrospective.pdf

American Association of University Professors. (2003, January). List of censured administration 1930-2002. *Academe Online*. Retrieved from http://www.aaup.org/AAUP/pubsres/academe/2003/JF/FTR/cenlist.htm

American Association of University Professors. (2003, November). Academic freedom and national security in a time of crisis. *Academe*, 89(6) 34-59.

American Association of University Professors (2003). Schrier v. University of Colorado, et al. Retrieved from http://www.aaup.org/NR/rdonlyres/19F30162-A5E7-49B9-A54A-5745FF4BA799/0/SchriervUofCO.pdf

American Association of University Professors. (2004). *AAUP amicus brief archives (1999-2004).* Retrieved from http://www.aaup.org/AAUP/programs/legal/1999-2004amicus.htm

American Association of University Professors. (2006). *AAUP policy documents & reports.* Baltimore, MD: John Hopkins Press.

American Association of University Professors. (2007a). *Informal glossary of AAUP terms and abbreviations*. Retrieved from http://www.aaup.org/AAUP/about/mission/glossary.htm?PF=1

American Association of University Professors. (2007b). *Academic bill of rights & intellectual diversity.* Retrieved from http://www.aaup.org/AAUP/GR/Archives/camp/ABOR/

American Association of University Professors. (2007c). *The academic bill of rights - Coming to your campus.* Retrieved from http://www.aaup.org/AAUP/GR/Archives/camp/ABOR/facultyhandout.htm

American Association of University Professors. (2010, December). *AAUP amicus brief.* Retrieved from http://www.aaup.org/AAUP/protect/legal/2005-10+amicus.htm

American Association of University Professors, The Foundation for Individual Rights in Education (FIRE), and The Thomas Jefferson Center for the Protection of Free Expression (2010). Adams v. The Trustees of The University Of North Carolina Wilmington – Amicus Curiae Brief. Retrieved from http://www.aaup.org/NR/rdonlyres/58506EE0-4E81-4AA9-9616-3768FFA8643A/0/Adamsamicusbrief7210.pdf

American Association of University Professors. (2011, January). [Committee A: Academic freedom and tenure case reports 1915 – 2010]. Unpublished raw data.

American Association of University Professors (2012). Chapter Web Sites. Retrieved from http://www.aaup.org/AAUP/about/chaps/

American Association of University Professors (2013). Censure List. Retrieved from http://www.aaup.org/our-programs/academic-freedom/censure-list

American Civil Liberties Union. (2011, February). *House blocks extension of overbroad patriot act provisions*. Retrieved from http://www.aclu.org/national-security/house-blocks-extension-overbroad-patriot-act-provisions

American Civil Liberties Union (ACLU), ACLU of Colorado (2011). Amicus Curiae Brief –Ward Churchill v. The University of Colorado and the Regents of the University of Colorado. Retrieved from http://aclu-co.org/sites/default/files/ACLU%20Churchill%20Amicus%20Brief%20Colorado%20Supreme%20Court.pdf

American Civil Liberties Union (ACLU), ACLU of Colorado, American Association of University Professors, National Coalition Against Censorship (2010). Amicus Curiae Brief – Ward Churchill v. The University of Colorado, the Regents of the University of Colorado. Retrieved from http://aclu-co.org/sites/default/files/churchill.amicus.2-18-10.pdf

American Civil Liberties Union (ACLU) and ACLU of Colorado (2011), Ward Churchill v. The University of Colorado, the Regents of the University of Colorado. Retrieved from http://aclu-co.org/sites/default/files/ACLU%20Churchill%20Amicus%20Brief%20Colorado%20Supreme%20Court.pdf

American Council of Trustees and Alumni. (n.d.). *Mission and history*. Retrieved from https://www.goacta.org/about/mission-and-history.cfm

American Council of Trustees and Alumni. (2010). *At a crossroads: A report card on public higher education in Minnesota.* Retrieved from https://www.goacta.org/publications/downloads/MNReportFinal.pdf

Association of American Universities. (1953, March 14). *AAU statement on the rights and responsibilities of universities and their faculties*. Retrieved from http://www.aau.edu

Association of American Universities. (2003, November 14). *AAU summarizes results for AAU universities*. Retrieved from http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=6670

Ave, M. (2005, December 5). Al-Arian trial: Q&A. *The St Petersburg Times*. Retrieved from http://www.sptimes.com/2005/12/07/Tampabay/Al_Arian_trial__QA.shtml

Bigsby, C. (2006). *The Cambridge companion to modern American culture*. Cambridge, UK: Cambridge University Press.

Blanchard, M. (2002). Why can't we ever learn? Cycles of sustainability, stress, and freedom of expression in the United States history. *Communications Law & Policy, 7(4)*, 347-378.

Brunner, B. & Haney, E. (n.d.). *Civil rights timeline-Milestones in the modern civil rights movement*. Retrieved from http://www.infoplease.com/spot/civilrightstimeline1.html

Byrd, N. (2007, May). Intellectual diversity legislation on the rise. *Academe 93*(3). Retrieved from http://www.aaup.org/AAUP/pubsres/academe/2007/MJ/NB/Diversity.htm

Campus Watch. (2011). *Mission statement*. Retrieved from http://www.campus-watch.org/about.php

Ceballos v. Garcetti, 2002 U.S. Dist. LEXIS 28039 (2002).

Ceballos v. Garcetti, 361 F.3d 1168; 2004 U.S. App. LEXIS 5328 (2004).

Ceballos v. Garcetti, 361 F.3d 1168 (9th Cir. 2004).

Cavalho, E. & Downing, D. (2010). *Academic freedom in the post-9/11 era*. New York, NY: Palgrave MacMillan.

Central Intelligence Agency Act, Pub.L. 81-110, 63 Stat. 208 (1949).

Churchill, W. (2003). *Some people push back: On the justice of roosting chickens*. Retrieved from http://cryptome.org/ward-churchill.htm

Churchill v. University of Colorado at Boulder, 2009 Colo. District Court, Case Number: 06CV11473 (2009).

Churchill v. University of Colorado at Boulder, 293 P. 3d 16 (Colo. App. 2010).

Churchill v. University of Colorado at Boulder, 285 P.3d 986 (Colo. 2012).

Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964).

Cole, J. (2005). Academic freedom under fire. *Daedalus, 134(2)*, 5-17.

Connick v. Meyers, 461 U.S. 138 (1983).

Cornell University Law School. (n.d.). *United States constitution*. Retrieved from http://topics.law.cornell.edu/constitution

Cornell University Law School. (1960). *Shelton v. Tucker*. Retrieved from http://www.law.cornell.edu/supct/html/historics/USSC_CR_0364_0479_ZS.html

Crabtree, D. (2002). *Academic freedom*. Retrieved from http://www.mckenziestudycenter.org/education/articles/acadfree.html

DelFattore, J. (2011). Defending academic freedom in the age of Garcetti. *Academe, 97(1)*. Retrieved from http://www.aaup.org/AAUP/pubsres/academe/2011/JF/Feat/delf.htm

Denvir, D. P. (2003). Reluctant foot soldiers: America's undergraduates rebuff opponents of academic freedom. *Academe, 87(6).*Retrieved from http://www.aaup.org/AAUP/pubsres/Academe/2003

Derrida, Jacques (1974). *Of Gramatology*. Baltimore, MD: Johns Hopkins University Press.

Donner, F. J. (1952, November 8). The Smith act–Baltimore version. *The Nation*. Retrieved from http://www.thenation.com/archive/smith-act-baltimore-version

Doumani, B. (2006). *Academic freedom after September 11*. Brooklyn, NY: Zone Books.

Dudziak, M. L. (2003). *September 11 in history*. Durham, NC: Duke University Press.

Duke Law Journal. (1965). The status of anti-communist legislation, *Duke Law Journal,* 1965(2), 369-385.

Dunlap, J. J. (2009). Lawfare: A Decisive Element of 21st-Century Conflicts? *JFQ: Joint Force Quarterly*, (54), 34-39.

Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848, 18 U.S.C. 2510 (1986).

Equal Pay Act of 1964, 29 U.S.C. 206 (1964).

Espionage Act of 1917, 18 U.S.C. 792 (1917).

Equal Employment Opportunity Commission. (1965, September 24). *1965 executive order 11246*. Retrieved from http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-11246.html

Euben, D. R. (2002, May). *Academic freedom of individual professors and higher education institutions: The legal landscape*. Retrieved from http://www.aaup.org/AAUP/protect/legal/topics/AF-profs-inst.htm

Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978).

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Garner, B. A. (1999). *Black's law dictionary* (7th ed.). St Paul, MN: West.

Gerstmann, E. & Streb, M. J. (2006). *Academic freedom at the dawn of a new century*. Stanford, CA: Stanford University Press.

Giroux, H. (Fall 2006). Academic freedom under fire: the case for critical pedagogy. *College Literature, 33(4)*, 1-42.

Glasscock, Kim (2007, January 18). University, SOM's Schrier reach settlement in lawsuit. *Silver & Gold Record reporter*.

Goldberg, E. & Sarabyn, K. (2011). Measuring a degree of difference: Institutional academic freedom in a post *Grutter* world. *Santa Clara Law Review, 51(1)*, 217-264.

Goodchild, L. F. & Wechsler, H. S. (1989). *ASHE reader on the history of higher education*. Needham Heights, MS: Ginn Press.

Goodman, R. T. (2006). Sami al-Arian, the politics of injury, and the Academic Bill of Rights. *College Literature*, 33.4, 113-136. Doi: 10.1353/lit.2006.0053.

Gratz v. Bollinger, 539 U.S. 244 (2003).

Griffin, M. R. (2007), The *Garcetti* test: limiting a public employee's freedom of speech and the Constitutional implications on academic speech: *Garcetti v. Ceballos*. *Jones Law Review 11(2)*, 141-169.

Grutter v. Bollinger, 16 F. Supp. 3d 797 (E.D. MI 1998).

Grutter v. Bollinger, 188 F.3d 394 (E.D. MI 1999).

Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

Grutter v. Bollinger, 137 F. Supp. 2d 874 (E.D. Mich. 2001).

Grutter v. Bollinger, 247 F.3d 631 (E.D. MI 2001).

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002)

Grutter v. Bollinger, 539 U.S. 306 (2003).

Hassumani, S. (2002). *Salman Rushdie a postmodern reading of his major works*. Cranburry, NJ: Farleigh Dickenson Press.

Hatch Act, 53 Stat. 1147 (1939); 54 Stat. 767 (1940).

Higher Education Act, Public Law 89-329, 79 Stat 1219 (1965).

Hogue, L. (2003). *The African American male, writing, and difference*. New York, NY: State University of New York Press.

Hong v. Grant, 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

Hong v. Grant, 403 Fed. Appx. 236 (9th Cir. 2010).

Hong v. Grant, 2009 Cal. LEXIS 2751.

Hong v. Grant, 2010 Cal. App. Unpub. LEXIS 5011.

Immigration Act, Pub.L. 64-301, 39 Stat. 874 (1917).

Immigration and Naturalization Act, Pub.L. 414; 182 Stat. 66 (1952).

Individuals with Disabilities Act, 29 U.S.C. 794 (1973).

Jaschik, S. (2013, April 1). Final Loss for Ward Churchill. *Inside Higher Ed*. Retrieved from http://www.insidehighered.com/news/2013/04/02/supreme-court-rejects-appeal-ward-churchill

Jaschik, S. (2006, February 13). David Horowitz has a list. *Inside Higher Ed*. Retrieved from http://www.insidehighered.com/news/2006/02/13/list

Kadushin, C. (1968, October). Power, influence and social circles: A new methodology for studying opinion makers. *American Sociological Review, 33(5)*, 685-699.

Kaplan, W. A. & Lee, B. A. (1995). *The law of higher education*. San Francisco, CA: Josey-Bass.

Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

Krippendorff, K. (2004). *Content analysis-An introduction to its methodology*. Thousand Oaks, CA: Sage Publishing.

Kruth, Susan (2013, April 5), Supreme Court Declines to Hear Ward Churchill. *Foundation for Individual Rights in Education*. Retrieved from http://www.thefire.org/article/15645.html

Leveille, D. E. (2006, December). *Accountability in higher education: A public agenda for trust and cultural change*. Retrieved from http://cshe.berkeley.edu/publications/docs/Leveille_Accountability.20.06.pdf

Levinson, Rachel B. (2007, April 17). *Annual legal update 34th annual national conference*. Retrieved from http://www.aaup.org/NR/rdonlyres/4688B976-859B-47DA-898A-D219FE1018B5/0/2007LegalUpdateFinal.pdf

Martin, J. L. & Neal, A. D. (2002). *Defending civilization: How our universities are failing America and what can be done about it*. Washington, DC: American Council of Trustees and Alumni.

Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477 (2007).

Miles, M. B. & Huberman, A. M. (1994). *Qualitative data analysis*. Thousand Oaks, CA: Sage Publications.

Morrill Land Grant Act of 1862, 12 Stat. 503, 7 U.S.C. 301 et seq. (1862).

Morrill Land Grant Act of 1890, 26 Stat. 417, 7 U.S.C. 322 et seq. (1890).

National Association of Scholars. (2011). *Who we are*. Retrieved from http://www.nas.org/who.cfm

National Security Act of 1947, 50 U.S.C. 401 et seq. (1947).

Nelson, C. (2009, December 11). *The AAUP: The view from the top*. Retrieved from http://chronicle.com/article/The-AAUP-A-View-From-the-Top/49301/

Nelson, C. (2010). *No university is an island saving academic freedom*. New York, NY: New York University Press.

Neuman I. & Benz, C. R. (1998). *Qualitative-quantitative research methodology exploring the interactive continuum*. Carbondale and Edwardsville, IL: Southern Illinois University Press.

New Hampshire Subversive Activities Act, 354 U.S. 234, 246 (1951).

O'Neil, R. M. (2003). Academic freedom and national security in times of crisis. *Academe,* 89 (3). Retrieved from http:www.aaup.org/AAUP/pursres/Academe/2003/MJ/Feat/ONei.htm

O'Neil, R. M. (2008). *Academic freedom in the wired world political extremism, corporate power and the university*. Cambridge, MA: Harvard University Press.

Onwuegbuzie, A. J. & Leech, N. L. (2004, December). Enhancing the interpretation of "significant" findings: The role of mixed methods research. *The Qualitative Report*, 9(4), 770-792.

Onwuegbuzie, A. J. & Leech, N. L. (2006, September). Linking research questions to mixed methods data analysis procedures. *The Qualitative Report, 11(3)*, 474-498.

Payne v. Univ. of Ark. Fort Smith, 2006 U.S. Dist. LEXIS 64798 (W.D. Ark., Sept. 8, 2006).

Pickering v. Board of Education, 391 U.S. 563 (1968).

Pyszczynski, T. A., Solomon, S., & Greenberg, J. (2002). *In the wake of 9/11: The psychology of terror*. Washington, DC: American Psychological Association.

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985).

Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (1973).

Ruethling, Gretchen (August 1, 2006). A Skeptic on 9/11 Prompts Questions on Academic Freedom. Retrieved from http://www.nytimes.com/2006/08/01/education/01madison.html

Rudolph, F. (1990). *The American college and university–A history*. Athens, GA: University of Georgia Press.

Schrecker, E. (2010, January). Ward Churchill at the Dalton Trumbo foundation: Academic freedom in the aftermath of 9/11. *AAUP Journal of Academic Freedom, 1*, 1-44.

Schrecker, E. (2010). *The lost soul of higher education*. New York, NY: The New Press.

Schrier v. University of Colorado, 427 F.3d 1253 (2005).

Schrier v. University of Colorado, Civil Action No. 02-cv-02366-MSK-BNB (2005). Retrieved from http://scholar.google.com/scholar_case?case=25448020795679726 90&hl=en&as_sdt=2&as_vis=1&oi=scholarr%5b7/10/2011

Schrier v. University of Colorado, Civil Action No. 02-cv-02366-MSK-BNB (2006). Retrieved from http://scholar.google.com/scholar_case?case=28397527285565663 75&hl=en&as_sdt=2,44

Scott, J. W. (2009). Knowledge, power, and academic freedom. *Social Research*, *76(2),* 451-480.

Shelton v. Tucker, 364 U.S. 479 (1960).

Smith Act, 18 U.S.C. 2385 (1940).

Smith, D. (2003). *Report from ground zero*. New York, NY: Penguin Press.

Somers, P. (n.d.). *Cycles of repression*. Unpublished essay.

Students for Academic Freedom (n.d.). *Academic bill of rights*. Retrieved from http://www.studentsforacademicfreedom.org/documents/1925/abor.html

Subversive Activities Control Act, Pub. L. 81-831, 64 Stat. 987, 992 (1952).

Sweezy v. New Hampshire, 355 U.S. 852 (1957).

TAHPDX (n.d.). *The immigration & naturalization act of 1952 (McCarran-Walter Act).* Retrieved from http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/PDFs/Immigration_Act_1952.pdf

The Thomas Jefferson Center for the Protection of Free Expression, and the American Association of University Professors (2005). Garcetti v. Ceballos - Brief of Amici Curiae. Retrieved from http://www.aclu.org/content/aclu-amicus-brief-garcetti-v-ceballos

The Thomas Jefferson Center for the Protection of Free Expression (2008, March 17). Hong v. Grant. Retrieved from http://www.tjcenter.org/legal/

Tucker, D. & Creller, J. (Autumn 2007). *1917 immigration act*. Retrieved from http://library.uwb.edu/guides/USimmigration/USimmigrationlegislation.html

United States Criminal Code 18, 18 USC section 2331 (2002).

United States v. Al-Arian, 514 F.3d 1184; 2008 U.S. App. LEXIS 1439.

United States v. Lynne Stewart, Mohammed Yoursy, Ahmed Abdel Sattar, 2009 U.S. App. (2009).

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub.L. 107-56, 115 Stat. 272 (2001).

U.S. Department of State. (2010). *The immigration act of 1924 (The Johnson-Reed Act)*. Retrieved from http://history.state.gov/milestones/1921-1936/ImmigrationAct

Univ. of California Regents v. Bakke, 438 U.S. 912 (1978).

Veysey, L. R. (1965). *The emergence of the American university*. Chicago, IL: The University of Chicago Press.

Virginia Law Review Association. (1920). Construction of the Espionage Act. *Virginia Law Review, 6 (1)*, 53-56.

Voting Rights Act of 1965, 42 U.S.C. 1973 et seq. (1965).

Vroom, Cynthia (2003). *The patriot act and academic freedom*. Presented at Academic Freedom Forum on June 11, 2003.

Waters, Melissa A. (2011). *Case Western Reserve Journal of International Law*. 44(1/2), 327-334.

Yacovelli v Moeser, 324 F. Supp. 2d 760 (2004).